Volume 6, No. 22, Pages 5960 to 6472, October 21 - November 1, 1991

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Citation Form: 6 FCC Rcd 1 (1991)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Discount Discs,
Shalimar, Florida
for a Forfeiture

ORDER

Adopted: August 12, 1991; Released: October 11, 1991

By the Commission:

1. Before the Commission is an Application for Review, dated August 3, 1990, from J. Mark Brewer, Esquire, on behalf of his client, Discount Discs (Discount), Shalimar, Florida, seeking review of a monetary forfeiture penalty. This penalty was imposed on Discount by a Notice of Forfeiture issued under Section 503(b) of the Communications Act of 1934 by the Commission's Norfolk, Virginia, field office on November 30, 1988. 47 U.S.C. Sec. 503(b). The Notice imposed a $2,000 monetary forfeiture penalty on Discount for willfully violating Section 2.803 of the Commission's rules by offering to sell on the telephone a Sierra personal computer that had not been certified by the Commission as required by Section 15.834(a)(2) of the Commission's rules. 47 C.F.R. Sec. 2.803 and 15.834(a)(2) (currently section 15.101(a)). The offer to sell was made to an FCC inspector posing as an individual buyer wishing to purchase a personal computer for use in his home.

2. We have reviewed the entire record of this proceeding and find no reason to disturb the results. We note that the Commission's records do not reflect that a personal computer was certified by the Commission under the name Discount Discs or Sierra. Furthermore, if the computer in question was certified in 1986 under a different name, Section 15.48 of the Commission's rules at that time required that the computer also be certified under the name Sierra. 47 CFR Sec. 15.48 (deleted in 1989). Discount, moreover, has not offered proof that the computer was certified.

3. IT IS ORDERED, that pursuant to Section 155(c)(5) of the Communications Act of 1934 and Section 1.115(g) of the Commission's Rules; 47 U.S.C. Sec. 155(c)(5), 47 C.F.R. Sec. 1.115(g), the Application for Review filed by J. Mark Brewer on behalf of Discount is DENIED.

4. IT IS FURTHER ORDERED that Discount forfeit to the United States $2,000 for its violation of Section 2.803 of the Commission's Rules. Payment should be submitted within 30 days of the receipt of this letter, and may be by check or money order payable to the Federal Communications Commission. The number 3153202-86-106 should be placed on the check and it should be sent to:

Norfolk Office
Federal Communications Commission
1200 Communications Circle
Virginia Beach, VA 23455-3725

Forfeitures not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Sec. 504(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Sound Broadcasting Corporation, Licensee of Radio Station KCNA-FM, Cave Junction, Oregon

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1991; Released: October 21, 1991

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, pursuant to Section 0.283 of the Commission's Rules, has under consideration (1) a $4,000 Notice of Apparent Liability (NAL) issued April 23, 1991, and (2) the response, received on May 26, 1991, of Charles R. Knerr, president of Sound Broadcasting Corporation, licensee of Radio Station KCNA-FM, Cave Junction, Oregon.

2. The forfeiture was assessed for Sound Broadcasting Corporation's willful and repeated violations of 18 U.S.C. § 1464 by broadcasting indecent material on Station KCNA-FM between 6:00 a.m. and approximately 10:00 a.m. on October 17, 1989, and again during this same time period on November 3, 1989.[1]

3. In response to the NAL, Sound acknowledges that the broadcasts in question occurred and does not challenge the Bureau's indecency findings on the merits. Instead, Sound asserts that it has suffered severe financial losses as a consequence of the broadcasts and the resulting negative publicity. Sound states that it cannot afford to pay the forfeiture, but fails to provide any of the documentation required to substantiate this claim pursuant to Section 1.80(f)(3) of the Commission's Rules. As indicated in the attachment to the NAL, such documentation includes, but is not limited to, a profit and loss statement that has been prepared under generally accepted accounting principles and that contains no data older than one year from the date of the licensee's response to the NAL. Since Sound has failed to provide any relevant documentation, its assertion that it is unable to pay the forfeiture cannot be credited.

4. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Sound Broadcasting Corporation, licensee of Radio Station KCNA-FM, Cave Junction, Oregon, FORFEIT to the United States the sum of Four Thousand Dollars ($4,000) for the willful and repeated violation of 18 U.S.C. § 1464. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

FOOTNOTE

[1] Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Section 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

IDB AERO-NAUTICAL COMMUNICATIONS, INC. File No. I-T-C-91-012

For authority pursuant to the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to provide maritime mobile satellite service in the Indian Ocean Region via the Inmarsat system

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 10, 1991; Released: October 21, 1991

By the Deputy Chief, Common Carrier Bureau:

1. On October 3, 1990, IDB Aero-Nautical Communications, Inc. (IDB-A), filed the above-captioned application requesting authority pursuant to the International Maritime Satellite Communications Act of 1978, 47 U.S.C. §§ 751 *et. seq.*, and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to provide maritime mobile satellite service (MMSS) in the Indian Ocean Region (IOR) via the Inmarsat system. The application was placed on public notice on October 18, 1990. Communications Satellite Corporation (Comsat) filed a petition to deny on November 19, 1990 but subsequently withdrew the petition on July 12, 1991. For the reasons set forth below, we grant the application.

2. IDB-A seeks authority to provide MMSS in the IOR via the Inmarsat satellite system using the Perth coast earth station (CES) operated by OTC Limited of Australia (OTC).[1] IDB-A says that it plans to provide Standard A telephone, including facsimile and data, and telex services. Ultimately, IDB-A wishes to provide other Inmarsat services, and thus requests blanket authority to provide any other MMSS service offered now or in the future by Inmarsat. IDB-A states that its provision of MMSS will be consistent with the Commission's decisions in Common Carrier Docket No. 87-75[2] and General Docket No. 84-1234.[3]

3. IDB-A states that it will bear minimal construction costs: only those associated with modifying the Perth CES to recognize IDB-A's Inmarsat identification number for the IOR. IDB-A states that estimated operating costs will be set forth in the cost justification to be submitted with IDB-A's tariff. Charges and regulations governing the services will be specified in one or more tariffs which IDB-A will file with the Commission to the extent required by law.

4. IDB-A states that the present application serves the public interest, convenience and necessity because it will permit IDB-A to offer MMSS services in the IOR. IDB-A states that there is an increasing demand for such services, and its entry into the market will substantially increase competition and result in lower charges, innovative service offerings, and better service to the public. Further, offering global MMSS services is vital for IDB-A to compete with foreign signatories and will be of enormous benefit to potential customers. Comsat also agrees that the public interest will benefit from allowing IDB-A's competing shore-to-ship service for U.S. originating traffic to the IOR, and concedes that the use of a foreign CES for ship-to-shore services is consistent with the Inmarsat Act.

5. IDB-A states that it is the first U.S. carrier to request authority to provide international MMSS services in the IOR. Since IOR satellites cannot be "seen" from the U.S., IDB-A states that it can only provide IOR service by using a foreign coast earth station. Comsat agrees that there are no U.S. facilities serving the IOR, and that it is impossible at present to provide IOR service through a U.S. coast earth station. Comsat therefore affirms that it would be impossible for IDB-A to provide Inmarsat service from the United States to the IOR other than through a foreign coast earth station.

6. We find that grant of this application, except for blanket authority to provide services not specifically enumerated, will advance the Commission's general policy of enhancing competition in the provision of maritime communications services.[4] It will serve the public interest, convenience and necessity because it will substantially increase competition, which should result in lower charges, innovative service offerings, and better service to the public. In particular, it will further effective U.S. competition with foreign signatories. We are not granting blanket authority to provide services not specifically mentioned because pursuant to Section 214 of the Communications Act and Section 63.01 of the Commission's Rules, carriers are required to file separate applications to provide new services. In the future, IDB-A may file applications to provide other services offered now or at a later time by Inmarsat. Finally, in the extraordinary circumstances present here, we find that it is necessary for IDB-A to use a foreign coast earth station in order to provide Inmarsat service in the IOR.[5] We note that the Bureau previously determined that IDB-A is a dominant carrier under *International Competitive Carrier*.[6]

7. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §§ 751 *et. seq.*, IT IS ORDERED that the application of IDB Aero-Nautical Communications, Inc., File No. I-T-C-91-012, IS GRANTED IN PART and IDB-A is authorized to provide Standard A telephone, including facsimile and data, and telex maritime mobile satellite service via the Inmarsat system in the Indian Ocean Region.

8. IT IS FURTHER ORDERED that IDB-A shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, file a tariff for the services authorized in this order before offering services to the public.

9. IT IS FURTHER ORDERED that IDB-A IS CLASSIFIED AS DOMINANT in its provision of maritime mobile satellite services via the Inmarsat system.

10. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] IDB-A has received special temporary authority (TAO-1845) to provide interim MMSS in the ship-to-shore direction only in the IOR via OTC's CES at Perth, Australia.

[2] Provision of Aeronautical Services via the Inmarsat System, 4 FCC Rcd 6072 (1989), *recon. pending*.

[3] Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, 4 FCC Rcd 6041 (1989); *remanded* Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991), *on remand* Tentative Decision, FCC 91-240 (released August 2, 1991).

[4] Implementation of Requirements of the International Maritime Satellite Telecommunications Act, 91 FCC 2d 245, 252 (1982).

[5] Comsat in its petition to deny raised an issue as to whether the Inmarsat Act, 47 U.S.C. §§ 751 *et seq.*, bars the use of foreign coast earth stations to carry U.S.-originating shore-to-ship traffic without Comsat's provision of the Inmarsat space segment. However, since Comsat has withdrawn its petition and hence is not asserting in this particular proceeding any purported statutory protection, we infer that Comsat is waiving any statutory right it might have to provide the space segment, if such a right exists. Thus, we limit our decision to allow the use of this foreign coast earth station to the particular facts of this case, and need not address the larger issue here. All the parties agree that without this arrangement in this case, service would not be possible.

[6] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986). *See* IDB Aeronautical Communications, Inc., 6 FCC Rcd 2485 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Execuline of Sacramento, Inc.
Transferor,

and File No. I-T-C-91-194-TC

American Sharecom, Inc.
Transferee.

Application for Transfer of Control of
Execuline of Sacramento, Inc. and its
International Resale Authorization
pursuant to Section 214 of the
Communications Act of 1934, as amended

MEMORANDUM, OPINION, AND ORDER

Adopted: October 11, 1991; Released: October 21, 1991

By the Chief, International Facilities Division:

1. On August 14, 1991, Execuline of Sacramento, Inc. (ESI) and American Sharecom, Inc. (ASI) filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, requesting authority to transfer control of ESI and its Section 214 authorization to ASI. The application was put on public notice on August 21, 1991, and no comments were received.

2. ESI states that it is a privately held California corporation. It is authorized to provide resold international message telecommunications services (IMTS) by reselling the switched voice services of AT&T, MCI, and US Sprint.[1] ESI operates under the regulatory requirements established for non-dominant international resale carriers in *International Competitive Carrier Policies* [2]. ESI also provides nationwide domestic interstate long-distance resale telecommunications services as a non-dominant domestic carrier and provides intrastate service in several states pursuant to certification, registration, or tariff requirements, or on an unregulated basis. Further, ESI is the licensee of several operating common carrier microwave stations. ESI has a tariff for international switched voice service on file with the Commission.

3. ASI is a privately held Minnesota corporation. Like ESI, it is authorized to operate as a non-dominant international resale carrier pursuant to *International Competitive Carrier Policies* [3] and provides a variety of domestic interstate long distance services as a non-dominant domestic carrier. It, too, provides intrastate service pursuant to certification registration, or tariff requirements or on an unregulated basis in several states. ASI states that it is not directly or indirectly owned by a foreign government, a foreign Post, Telephone, or Telegraph administration (PTT), or a foreign telecommunications or telecommunications related service provider, including any provider of long distance communications, satellite or microwave communications, cable television or broadcasting services, data processing, information databases, or consulting services. Further, it states that no employee, agent, or representative of any of the foregoing telecommunications entities sits on the board of directors. It therefore maintains that it is not a dominant international carrier as defined in *International Competitive Carrier Policies*.

4. The application states that ASI will acquire ownership of all of ESI's capital stock in exchange for a combination of cash and promissory notes amounting to approximately $5,565,000. ESI will become a wholly owned subsidiary of ASI. The transaction, according to the parties, will be completely transparent to ESI's customers. ESI will continue to use the same name and to provide service under the existing terms and conditions pursuant to its tariff currently on file with the Commission. Applicants state that the transaction will not result in any inconvenience, confusion, or interruption of service to ESI's customers.

5. The applicants state that the proposed transaction will permit ESI to continue to provide high quality, low cost telecommunications services and to compete more effectively in the international switched voice service market. ESI and ASI state that they will realize significant economic, marketing, and operational efficiencies by establishing ESI as a wholly owned subsidiary of ASI. The transaction will also create substantial management, financial, and network efficiencies which will reduce the carriers' costs and enable both ESI and ASI to reduce rates and increase profitability over time.

6. In view of the foregoing, we conclude that the transfer of control of ESI and its certificate to ASI will serve the public interest. It will permit the continuance of service to ESI customers and will promote competition in the international switched voice service market. We note that after the proposed transfer of control, ESI will be subject to streamlined regulatory requirements for non-dominant international telecommunications carriers.

7. Accordingly, IT IS ORDERED that the application of Execuline of Sacramento, Inc. and American Sharecom, Inc., File No. I-T-C-91-194-TC, IS GRANTED and we consent to the transfer of control of Execuline of Sacramento, Inc. and its Section 214 authorizations originally granted in File Nos. I-T-C-86-073 and I-T-C-88-130 (*see* n.1) to ASI.

8. IT IS FURTHER ORDERED that ESI must continue to maintain tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

9. IT IS FURTHER ORDERED that ESI must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61 (October 1, 1990).

10. IT IS FURTHER ORDERED that ESI is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Tariffs FCC Nos. 1 and 2, MCI Tariff FCC No. 1, and US Sprint Tariffs FCC Nos. 1 and 2, between the U.S. and those points listed in the aforementioned tariffs in accordance with the above-captioned applicant's previous authorization (*see* n.1).

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Execuline of Sacramento, Inc., File No. I-T-C-86-073, Mimeo No. 4203 (released May 2, 1986); Execuline of Sacramento, Inc., File No. I-T-C-88-130, 3 FCC Rcd 4424 (1988).

[2] *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies*).

[3] *See* American Sharecom, Inc., File No. I-T-C-88-145, 3 FCC Rcd 4946 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SUN COMMUNICATIONS, INC. File No. 10232-CL-P-581-A-88

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 581, North Dakota 2 - Bottineau

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1991; Released: October 21, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address a "Second Petition for Further Reconsideration" filed by Sun Communications, Inc. (Sun).[1] Sun seeks reversal of an order released by the Common Carrier Bureau reaffirming the Bureau's prior ruling that Sun's failure to sign the certification required by Section 22.923(b)(7) of our rules justified dismissal of Sun's application. Sun argues that the required certification, which is printed on the transmittal sheet for its application, is unlawful on its face and therefore that failure to sign it cannot be a proper basis for the dismissal of Sun's application. For the reasons stated in this order, we dismiss Sun's most recent petition.

II. BACKGROUND

2. Sun won the non-wireline lottery for the North Dakota 2 - Bottineau Rural Service Area (RSA), Market No. 581. Initially, the Mobile Services Division dismissed Sun's application as unacceptable for filing because Sun failed to submit a full-size 1:250,000 scale map as required by Section 22.903(a) of the Commission's rules. Subsequently, in *Sun Communications, Inc.*, 4 FCC Rcd 6429 (Com. Car. Bur. 1989) (*Bureau Order*), the Common Carrier Bureau (Bureau) determined that since Sun's 1:500,000 scale map submitted after the lottery with its paper original application was legible, with clear latitude, longitude, and scale markings depicted on its face, the improper map scale did not render the application unacceptable for filing under Section 22.20 of the rules. Nevertheless, the *Bureau Order* dismissed Sun's application because Sun had not signed the certification statement printed on the transmittal sheet which was filed with its initial (microfiche) application. Thus, Sun's application was dismissed for failure to comply with the Commission's "letter perfect" standard. *See, e.g., Satellite Cellular Systems*, 5 FCC Rcd 1758 (1990).

3. Sun then filed a "Petition for Further Reconsideration or for Waiver of the Commission's Rules," requesting that the Bureau either reinstate its application or waive the certification requirement. The Bureau reaffirmed its prior ruling that failure to comply with the Commission's "letter perfect" requirements results in the dismissal of initial cellular applications subject to lotteries, no matter when the defect is discovered, and found that Sun had not presented sufficient grounds to waive the certification requirement of the "letter perfect" standard. *Sun Communications, Inc.*, 5 FCC Rcd 2891 (Com. Car. Bur. 1990) (*Further Reconsideration Order*).

4. Sun has filed a "Second Petition for Further Reconsideration," claiming that the certification printed on the transmittal sheet is unlawful on its face and that, therefore, Sun's failure to sign that certification cannot be a proper basis for the denial or dismissal of its application.

5. Sun observes that the first paragraph of the printed certification states:

> I hereby certify, under penalties of perjury, this [sic] application for an initial cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that if, upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration.

Sun argues that the Commission cannot lawfully require an applicant to sign a certification which makes the applicant subject to the penalties of perjury pursuant to 18 U.S.C. Section 1621(2) simply for submitting an incomplete application. In this regard, Sun observes that 28 U.S.C. Section 1746 prescribes a specific form for making unsworn declarations under penalty of perjury in lieu of affidavits or sworn declarations. Subsection (2) of the referenced section contains the required language for such an unsworn declaration executed within the United States. The language is: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct." Given the foregoing language, Sun argues, the proper form for a certification under penalty of perjury must include language stating that the matter asserted is true and correct.

6. Sun asserts that the first paragraph of Section 22.923(b)(7) of our rules, which is the source of the certification language on the transmittal sheet for RSA applications, is not in the form prescribed by 28 U.S.C. Section 1746. Further, Sun claims, the legal basis for invoking the penalties of perjury under 18 U.S.C. 1621(2), namely, that the applicant has willfully subscribed as true a material matter which he does not believe to be true, cannot possibly apply because the applicant has not subscribed anything to be true. Sun cites several cases for the principle that an accused person is guilty of perjury only if he can be shown to have been aware that he was making false statements.[2] Sun notes that the third paragraph of the certification contains the correct language for a declaration under penalties of perjury, namely: "I declare, under penalties of perjury, that . . . the matter and things therein stated are true and correct." Nevertheless, Sun claims that the declaration in the third paragraph does not cure the defect in the certification contained in the first paragraph. Thus, Sun concludes, the entire certification is unlawful.

III. DISCUSSION

7. Sun has provided no explanation of why it waited until its second petition for reconsideration of the Bureau's action to raise its allegations regarding the specific language of the certification. Nor do we find any public interest reasons for considering these new matters at this late stage of the proceeding. Accordingly, we are dismissing Sun's petition. *See* 47 C.F.R. Section 1.106(c); *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285, slip op. at 9 (D.C. Cir. April 23, 1991) (in seeking relief before the FCC, litigants should take the "earliest available corrective step"). In any event, we note that whether or not the language of the certification could serve as the basis for a perjury conviction is irrelevant to the ability of the Commission to dismiss an application pursuant to its rules for failure to comply with the certification requirement. In this regard, neither 18 U.S.C. Section 1621(2) nor 28 U.S.C. Section 1746 states (or even suggests) that an agency certification requirement would be unenforceable by the agency simply because it might not sustain a perjury conviction. Moreover, Sun does not even claim to have relied on the alleged deficiencies in the language of the certification as a basis for its failure to sign the certification.

8. Accordingly, IT IS ORDERED that the "Second Petition for Further Reconsideration" filed June 7, 1990, by Sun Communications, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Bureau referred Sun's filing to the Commission pursuant to 47 C.F.R. Section 1.106(a)(1).

[2] *See, e.g., U.S. v. Sweig*, 441 F.2d 114 (2d Cir. 1971), *cert. denied, 403 U.S. 932 (1971)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Applications
For Renewal of Certain
Broadcast Stations Serving
Communities in the States of
Alabama and Georgia

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1991; Released: October 22, 1991

By the Commission: Commissioner Quello concurring in the results.

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1. The Commission has before it for consideration: (i) a timely "Petition to Deny" filed by Region V of the NAACP, various local branches of the NAACP, and the National Black Media Coalition (NAACP/NBMC) against the renewal applications of five licensees for eight broadcast stations serving various communities in Alabama and Georgia:[1] (ii) opposition pleadings from the licensees; and (iii) various other pleadings.

2. Petitioners charge that the EEO programs and employment profiles of each of the stations reveal that the licensees have not complied with the Commission's EEO Rule (Section 73.2080) or policies with respect to Blacks and other minorities.[2] The petitioners contend that each of the stations hired few, if any, minorities throughout their license terms, failed to have meaningful equal opportunity programs, and failed to recognize deficiencies and propose steps to correct them. Petitioners request that we investigate the EEO policies of the challenged stations pursuant to *Bilingual-Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate each application for an evidentiary hearing and deny each of the applications.

3. The licensees deny all allegations and maintain that the petitioners have failed to present evidence of noncompliance with the Commission's rules or policies sufficient to warrant inquiries, hearings, or denials of the licenses. Accordingly, they request unconditional license renewals.

4. **PROCEDURAL MATTERS.** In challenging an application pursuant to 309(d) of the Communications Act, as amended, 47 U.S.C. 309(d), a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshhold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with (the public interest, convenience, and necessity)." 47 U.S.C. 309(d); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. 309 (d)(1).

5. With respect to NBMC, it timely submitted a statement from Pluria Marshall, Chairman of the NBMC and a resident of Washington, D.C. However, the Commission has previously held that statements of a person who is neither a listener of the challenged stations nor a resident in the service areas of the challenged stations do not satisfy the requirements of the Act. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Company*, 55 Rad. Reg. 2d (P&F) 1311, 1311-12 (1984). Accordingly, we hold that NBMC lacks standing to petition any of the stations in question and we will treat NBMC's pleading as an informal objection.

6. With respect to NAACP, it timely submitted a statement from Earl Shinhoster, Director of Region V of the NAACP and a resident of Atlanta, Georgia. Like Pluria Marshall, Earl Shinhoster is neither a listener of the challenged stations nor a resident in the service areas of the challenged stations and therefore his statement does not satisfy the requirements of the Act. However, unlike NBMC, NAACP submitted additional statements, some of which establish it as a valid petitioner against some stations.

7. WBHP and WVNA challenge NAACP's standing to file the instant petition against them on the ground that NAACP failed to submit timely affidavits or statements from members who are listeners of the stations or residents of the service areas of the stations. Our review shows that NAACP did not file the required statements or declarations for either station. Accordingly, pursuant to Section 73.3584(b) of the Commission's Rules, 47 C.F.R. Section 73.3584(b), we will consider NAACP an informal objector against Stations WBHP and WVNA.

8. The Lowndes-Valdosta Branch of the NAACP timely submitted a statement from Lewis Gordon, a regular listener to Station WQPW. The licensee of WQPW challenges NAACP's standing as petitioner on two grounds. First, it argues that the type of statements submitted by NAACP fail to demonstrate the requisite organizational standing for the NAACP. It argues that "[n]owhere in the body of the Petition does the NAACP demonstrate . . . standing or explain how it is a "party in interest" with respect to . . . " this station's renewal application. How-

ever, as the Commission has previously ruled, "[a]n organization may establish standing to represent interests of local listeners or viewers . . . " by providing "the affidavit of one or more individuals entitled to standing indicating that the group represents local residents and that the petition is filed on their behalf." *Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 F.C.C. 2d 89, 99 (1980). Second, the licensee argues that the statement submitted regarding WQPW is not sufficient because the station's call letters were misprinted throughout the petition as well as in the statement by Mr. Lewis Gordon, calling into question his contention that he is a regular listener. Furthermore, the licensee challenges whether the facts alleged against the station were true to Mr. Gordon's personal knowledge in light of the misprinted call letters. We find no merit to this argument. Accordingly, we conclude that the NAACP has standing as a petitioner against Station WQPW.

9. In addition to WQPW, the Selma-Dallas County Branch of the NAACP and the Birmingham Branch of the NAACP also submitted timely affidavits from listeners of stations WHBB and WAPI, respectively. Therefore, the NAACP will be considered a petitioner against these stations.

10. **DISCUSSION.** Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pools. The Commission also looks for any evidence of discrimination by a licensee.

11. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application will be granted, if otherwise appropriate. When it indicates evidence of inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist, or if we otherwise cannot find that grant of the application would be consistent with the public interest, we will designate the renewal application for hearing. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO*), *petition for reconsideration pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters); *See e.g. Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual-Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

12. The factual allegations of the petition are derived entirely from the stations' EEO programs, annual employment reports, and responses to our letters of inquiry. Our review of those documents leads us to conclude that a *prima facie* case concerning non-compliance with our EEO rule was raised as to each of these stations. After evaluating the stations' EEO efforts in light of their oppositions and inquiry responses, and the NAACP/NBMC's arguments, we find that no substantial and material questions of fact requiring a hearing are present. While we find that grant of the renewal applications will serve the public interest, we will impose sanctions and prospective remedies as detailed herein.

WAPI(AM)/WAPI-FM, Birmingham, Alabama

13. Review of the stations' renewal application, opposition and inquiry response indicates that the station had 54 hiring opportunities from November 1, 1985, through November 1, 1988. During the reporting year, *i.e.*, the 12-month period prior to the submission of the renewal application, the licensee contacted three newspapers from which it received three minority referrals: one minority newspaper, the *Birmingham Times*,[3] and two general newspapers, the *Birmingham News* and the *Birmingham Post Herald*. It also contacted eight other general sources which yielded no minority referrals.[4] The licensee states that it kept no detailed recruitment information prior to November 1, 1987.[5] Thus, we do not have data for 40 of the station's 54 hires from 1985 through 1988. The licensee provides recruitment information for the 14 overall[6], including thirteen upper-level full-time hires that occurred between November 1, 1987, and November 1, 1988. For six of the 14 hires, the licensee contacted three newspapers, one of which was a minority source. For one of the other hires, the licensee contacted a temporary agency. For the remaining seven hires, it did no formal recruiting. No information exists as to the number, sex or race of the applicants for two of the fourteen vacancies. From the information that was provided, it appears that the licensee interviewed 96 applicants, 13 of whom were minorities, for the 12 remaining hiring opportunities. Minorities were in the interview pools for eight of those 12 vacancies. The stations hired two Blacks, including one Black for an upper-level position. In addition, the stations reported that from November 1, 1985, through November 1, 1988, it hired Blacks for six of the 54 full-time openings.[7] The licensee states that it believes that its "affirmative action program has achieved positive results and is in substantial compliance with the Commission policy."[8]

14. NAACP/NBMC argue that the licensee did not contact all the organizations listed on its model EEO program and did not contact any community organizations or minority media during the reporting year. In addition, they question the licensee's failure to list 50 part-time research workers as employees and its failure to report the number of minorities recruited and/or hired for these positions. They also assert that "[t]he licensee's self-analysis contains nothing to indicate that it is even aware that its EEO program has failed to produce meaningful results during the license term."

15. In response, the licensee states that it has maintained a continuous and productive EEO program since it acquired the station. It states that it looked to more productive sources such as local newspapers, local employment agencies and employee contracts rather than the community organizations listed on its model EEO program because these sources never produced any referrals. Contrary to NAACP/NBMC's statement, the licensee points out that it did contact a minority media source during the reporting year, the *Birmingham Times*, a Black owned and operated newspaper. In its opposition, the licensee includes ads placed in the *Birmingham Times* describing specific openings for sales positions. In addi-

tion, its opposition indicates that the licensee sent letters in January 1989, regarding a sales position to nine other recruitment sources, including several sources likely to produce female and minority applicants. Addressing the issue of the 50 call-out research workers, the licensee repeats its reasons for not counting the workers as employees, see *supra*, n.6. However, the licensee adds that for these positions it usually contacted the University of Alabama Placement Program and Jefferson State Community College, that approximately 50% of the applicants for these positions were minorities and that it currently employs ten part-time researchers, three of whom are Black.

16. We conclude that the stations' EEO record does not raise substantial and material questions of fact sufficient to warrant a hearing. In addition, we find no evidence of discrimination by the licensee. However, we are concerned that the licensee lacks important information and documentation that is needed for accurate and effective self-assessment. Specifically, the licensee does not have sufficient recruitment information for 40 positions over a two year period. Proper self-assessment of an EEO program under these circumstances is difficult if not impossible. The record of WAPI(AM)/WAPI-FM is similar to that of WLKF/WEZY(FM). *See Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area*, 5 FCC Rcd 6738, 6739-6740 (1990). In that case, we imposed reporting conditions because the licensee failed to maintain applicant information for 30 of its 34 hires. The licensee of WLKF/WEZY(FM), like the licensee here, did not have sufficient information to meaningfully self-assess its EEO program. Accordingly, we will grant renewal subject to reporting conditions.[9]

WHBB(AM)/WDXX(FM), Selma, Alabama[10]

17. Review of the stations' renewal application, opposition and inquiry response indicates that the licensee had 15 full-time upper-level vacancies from June 30, 1987, when it took control of the stations, through November 1, 1988. During the reporting year, the licensee contacted several general recruitment sources including the *Selma Times Journal* (46 minority referrals), the University of Alabama (three minority referrals), the Selma City Schools (two minority referrals), and the Gavin Report (no minority referrals). For every position, the General Manager states that he contacted a minority source, Riley College[11] and several general recruitment sources including the *Selma Times Journal*, area schools including George C. Wallace Community College, Concordia College, Riley College, Selma University, the Selma City High Schools[12], and the State Employment Service.[13] The licensee states that it has no record of the number, race or gender of applicants for any of the positions because of changes in management personnel. In filling the 15 vacancies, the licensee hired two Blacks for upper-level positions.[14]

18. The NAACP/NBMC doubt the veracity of the licensee's claim that it received 46 minority referrals from the *Selma Times Journal*, a non-minority newspaper. They state that if this claim were true, it "would represent a national record" and it would indicate that the *Selma Times Journal* "is generating more referrals of minorities for broadcast employment than the *New York Times* typically generates for New York City radio stations." NAACP/NBMC also question the large number of minority referrals received from the *Selma Times Journal* in comparison to the small number (two) of minority referrals received from the Selma County Schools. They also state that the licensee contacted no minority organizations during the reporting year and gave no explanation on its renewal application for "the near absence of minorities in meaningful positions throughout the license term."

19. The licensee responds to the petitioners allegations by stating that Selma, Alabama, is a small city and the *Selma Times Journal* is the only basic newspaper of general circulation in the area. It further states that under such circumstances it is not "outside the realm of possibility to believe . . . " that it received 46 minority referrals from such a source.[15] In addition, it states that it is aware of the importance of a sound EEO policy and that the Commission looks closely at the data provided in the renewal application. Therefore, it states that it would never misrepresent those figures. Regarding the small number of referrals from the Selma City Schools, the licensee states that the two referrals listed on the renewal application do not, in fact, reflect the number of referrals received from this source but only reflect the number of individuals hired from this source.[16] According to the licensee, it received "dozens" of referrals from the Selma City Schools. Regarding the low number of minorities employed at the stations, the licensee cites the low minority employment figures before it took control of the station[17] and argues that these low figures, combined "with the usual turmoil that accompanies a change in ownership makes it unreasonable to presume . . . " that it could completely correct these deficiencies in the short time that it has owned the station.

20. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing and no evidence of discrimination by the licensee. The stations did attract and hire minorities for upper-level positions. However, we are concerned that the licensee apparently lacks important information and documentation that is needed for accurate and effective self-assessment. Specifically, the licensee kept no record of applicant flow. Proper self-assessment of an EEO program under these circumstances is difficult, if not impossible. Accordingly, we find the record of WHBB(AM)/WDXX(FM) is similar to that of WLKF/WEZY(FM) where we imposed reporting conditions. *See Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and other Communities in the Florida Area*, 5 FCC Rcd 6738, 6739-40 (1990). (*WLKF/WEZY (FM)*). There, as here, the licensee failed to keep adequate EEO records and was not in a position to meaningfully self-assess its EEO program. In view of the foregoing, we will grant renewal subject to reporting conditions.

WVNA(AM)/WVNA-FM, Tuscumbia, Alabama

21. Review of the stations' renewal applications, its opposition and inquiry response indicates that from October 1, 1985, through October 1, 1988, the licensee had 13 overall, including nine upper-level, full-time hiring opportunities. During the reporting year, the licensee contacted several general sources, including *Radio and Records Magazine* (two minority referrals), its own employees (one minority referral), the University of North Alabama Placement Office (unknown number of minority referrals). The stations also contacted but received no referrals from the University of North Alabama Broadcast School, three local high schools, the Chamber of Com-

merce, the Alabama State Employment Service, and two employment agencies. In addition, the stations participated in an internship program with several local high schools and a university. The licensee affirmatively recruited for six of 13 overall full-time hiring opportunities. However, it is unclear how many applicants applied for three of the positions for which the licensee recruited. Twenty-one applicants, three of whom were Black, applied for the remaining 10 positions. Blacks were in the applicant pool for three of those 10 full-time openings. The stations hired one Black for a lower-level craftworker position.[18] The licensee indicates that in February, 1987, it offered a Black male an upper-level position but he declined. The licensee states that it has problems attracting minorities because of the low percentage of minorities in the available labor force and because many surrounding stations are competing for employees.[19] It adds that, to improve its recruitment of minorities, it will begin contacting the NAACP.[20]

22. NAACP/NBMC argue the licensee's current renewal application[21] makes no mention of a minority training program that the licensee featured in its 1982 renewal application. In addition, NAACP/NBMC state that the licensee did not contact a single minority organization, minority educational institution or minority media outlet or hire a minority during the reporting year. They also state that they found no explanation in the licensee's renewal application "for the near absence of minority employees in meaningful positions throughout the license term."

23. In response, the licensee states that it has continued its training program and that, although it has not contacted minority sources, it has contacted general sources likely to refer minorities. The licensee also adds that it did hire a minority during the reporting year, but the minority was mistakenly omitted from the renewal application.

24. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing and no evidence of discrimination by the licensee. The station did attract and hire minority applicants. However, we are concerned with the licensee's EEO efforts and its assessment of those efforts. The licensee affirmatively recruited for less than half of its job openings. In addition, minorities were in the applicant pool for only three of 10 positions.[22]

25. The record of WVNA(AM)/WVNA-FM is similar to that of WOLL(FM) in *In re Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990) where we granted renewal of the station's license subject to reporting conditions and a forfeiture of $3,000. In both cases, the licensees did not meaningfully self-assess their EEO programs. Both licensees failed to alter their recruitment practices even though no minorities were employed in upper-level positions at the stations for the last three years of the license term. Accordingly, we will impose reporting conditions and a Notice of Apparent Liability For Forfeiture for $3,000.

WBHP(AM), Huntsville, Alabama

26. Review of the station's renewal application, its opposition and response to our letter of inquiry indicates that from December 1, 1985, through December 1, 1988, the station had 19 overall, including 17 upper-level full-time hiring opportunities. During the 12-month period prior to the filing of the renewal application, the licensee states that it contacted two minority sources: Oakwood College, from which it received two minority referrals, and Alabama A & M University, from which it received no minority referrals.[23] It contacted several general recruitment sources, including the *Huntsville Times*, from which it received 11 minority referrals. It received no minority referrals from the following general sources: *Radio and Records Magazine*, *Broadcasting Magazine*, *Radio and Television News Directors Magazine*, the University of Alabama in Huntsville, and the Huntsville Advertising Federation. Other sources contacted throughout the license term include the Alabama Broadcast Association, the Alabama Radio Network, *Billboard Magazine*, the *Huntsville News*, Snelling and Snelling, the Huntsville Ad Club, Talent Masters, the Georgia Broadcast Association, the Associated Press and the National Association of Broadcasters. The station contacted general recruitment sources for 18 of the 19 vacancies. The remaining vacancy was filled by a former employee. No application information existed for three of the 19 vacancies. Twenty-six of the 301 applicants for the remaining 16 positions were Black. However, 22 of the 26 Black applicants were in the applicant pool for only two of the positions, both clerical, and the remaining four Blacks were in the applicant pool for only an additional two positions. Thus, Blacks were not in the applicant pool for 12 of the 16 positions. No minorities were hired for any of the positions. The licensee states in its renewal application that the station "has not experienced a good flow of minority applications" and that to improve this situation the licensee will expand its list of recruitment sources[24] to include the Career Advisory and Placement Offices of Alabama A & M University and Oakwood College, the Huntsville Chapter of the NAACP, the National Association of Broadcasters Employment Clearinghouse, Snelling and Snelling Placement Services of Huntsville, and the Huntsville Advertising Association.[25]

27. NAACP/NBMC argue that the licensee did not list any minority organizations in its renewal application and did not hire any minorities during the reporting year. In addition, NAACP/NBMC state that the licensee provides no explanation in its renewal applicaton "for the near absence of minorities in meaningful positions throughout the license term."

28. It appears that the licensee did not adequately self-assess its EEO program until the last months of the license term. Despite the fact that the recruitment sources that it contacted were not generating an adequate number of qualified minority applicants, especially for upper-level positions, the licensee did not alter its list of recruitment sources until it filed its renewal application on December 1, 1988 -- four months before the license term expired.

29. We find no substantial and material question of fact to warrant a hearing and no evidence of discrimination by the licensee. The licensee did attract minority applicants. However, we find the record of Station WBHP(AM) similar to, but less egregious than, the record of Stations WOOJ/WOOJ-FM in *Dwyer Broadcasting, Inc.*, 4 FCC Rcd 6178 (1989), where we imposed reporting conditions and a Notice of Apparent Liability of $15,000. Both licensees failed to meaningfully self-assess their EEO programs. Despite receiving few qualified minority applicants in areas with significant available minority labor forces, neither licensee altered its EEO program until the end of the license term. However, whereas the licensee of WOOJ/WOOJ-FM mailed out general recruitment letters to minority sources on an annual basis without mention-

ing specific job vacancies, the licensee of WBHP(AM) mailed specific job notices to general recruitment sources and received minority referrals from those sources. *See* n.22, *supra*, concerning the use of general recruitment sources.

30. Because WBHP(AM)'s record is less egregious than that of WOOJ, we are giving it correspondingly lesser sanctions and remedies. Accordingly, we impose reporting conditions and a Notice of Apparent Liability for Forfeiture of $9,000 on Station WBHP(AM).

WQPW(FM), Valdosta, Georgia[26]

31. Review of the station's renewal application, its opposition, and inquiry response indicates that from October 1, 1985, through October 1, 1988, the licensee had 27 overall, including 20 upper-level, full-time hiring opportunities. During the reporting year, the licensee contacted a variety of different recruitment sources including several minority sources. The minority recruitment sources included Valdosta Technical Institute (no minority referrals) and Valdosta State College (three minority referrals).[27] The general sources included the *Valdosta Daily Times* (three minority referrals), *Radio and Records Magazine* (two minority referrals), Valdosta High D.E.C.A. Club (one minority referral), Troy State Job Placement (two minority referrals), employees (one minority referral), the Mr. Employer Employment Agency (no minority referrals), and Lowndes County School D.E.C.A. Club (no minority referrals). The licensee also ran ads on its station from time to time but reported no minority referrals from this source. Additional sources contacted during the license term included four other employment agencies, the Georgia Department of Labor, and Georgia Military College (one minority referral).[28] It is unclear how often the licensee affirmatively recruited for the 27 vacancies. For many of the positions, the licensee states that it placed ads in various publications, aired ads on the radio, contacted employment agencies or posted notices at Valdosta State College. However, evidence provided by the licensee indicates that it often did not notify these sources of specific openings.[29] The licensee indicates that it maintains monthly employment ads in *Radio and Records Magazine* to stockpile job applications for full-time disc jockey positions. In examples of these ads supplied by the licensee, one ad simply states that the station has openings and another ad simply states that the station is looking for a talented "personality" for future openings. An example of an ad aired on the station states that "[f]rom time to time there are job openings in our sales department, programming department or in the [general] office." and that "when that occurs, [WQPW] turns first to job applications already on file." Regarding Valdosta State College, the licensee states that it maintains a posting of job qualifications at the college's placement office and that the office periodically sends students to the station for interviews. In its opposition, the licensee describes several occasions when it interviewed a minority but did not hire him or her because no position was open at the time. Given this evidence, it appears that the licensee often simply maintained general notices of employment with these sources and stockpiled applications rather than notify these sources when specific openings occurred. Minorities were in the applicant pools for 14 of the 27 positions.[30] One hundred sixty six applicants[31] applied for the 27 positions and of these, 77 were interviewed. Of those interviewed, ten were minorities, including eight Blacks and two Hispanics. One Black and two Hispanics[32] were hired for three upper-level positions.[33]

32. NAACP/NBMC argue that no minority organizations, minority schools, or minority media were listed in the licensee's current renewal application, including the one minority organization that it listed on its 1982 renewal application. NAACP/NBMC also state that no minorities were listed as full or part-time employees on the station's 1988 Annual Employment Report.

33. In response, the licensee acknowledges that its numerical performance regarding hiring minorities for full-time positions was deficient. It notes, however, that it recently implemented several new programs beginning in March 1989, to improve its performance in this area, including soliciting applications from the Valdosta Minority Business Group and the Black History Action Committee.[34] The licensee also argues that its part-time hiring practices are an important part of its EEO plan and should not be overlooked. It employs students from Valdosta State College, some of whom are minorities, in part-time positions where they can "obtain on-the-job training while gaining experience and confidence, all valuable benefits, especially to minorities who have been traditionally denied access to the broadcast industry."

34. Although the licensee contacted a variety of sources, it appears from the examples of newspaper ads and postings that the licensee often did not advertise or contact sources regarding particular openings and that it often chose applicants from applications already on file rather than affirmatively recruiting when an opening occurred.[35] The licensee did employ one Asian in an upper-level position for three of the seven years of the license term and it hired two Hispanics in 1988. However, we put a greater emphasis on a stations's efforts regarding the dominant minority in the labor force. *Bilingual-Bicultural of Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621, 625 (D.C. Cir. 1978). Blacks are the dominant minority and represent 26.3% of the available labor force. The licensee did not employ any Blacks until July 1988, the last year of the license term. The licensee argues that its employment of minorities in part-time positions should not be overlooked. However, while we might consider part-time employment to be a mitigating factor to some extent in appropriate cases, such consideration is unwarranted here. First, we would not consider such employment as a substitute for the licensee's failure to employ Blacks, the dominant minority, in full-time positions until the the last year of the license term or as mitigation for a record of substantially inadequate efforts to recruit more minorities for full-time positions. Second, no evidence exists that minority part-time employees have ever been promoted to full-time positions.

35. In summary, we find no substantial and material question of fact to warrant a hearing and no evidence of discrimination by the licensee. However, we find that the EEO record of WQPW(FM) is similar to that of WOOJ/WOOJ-FM in *Dwyer Broadcasting, Inc.*, 4 FCC Rcd 6178 (1989), in which we imposed reporting conditions and a Notice of Apparent Liability for $15,000. In both cases, the licensees often failed to notify recruitment sources of specific openings and failed to meaningfully self-assess their EEO programs. In addition, neither licensee employed a member of the dominant minority until the last year of the license term. Accordingly, we

impose reporting conditions for three years and a Notice of Apparent Liability for Forfeiture of $15,000 of Station WQPW(FM).

36. Accordingly, IT IS ORDERED that the petition to deny filed by the NAACP regarding stations WAPI(AM)/WAPI-FM, WHBB(AM)/WDXX(FM) and WQPW(FM) and the informal objection filed by the NAACP against WVNA(AM)/WVNA-FM and WBHP(AM) ARE DENIED.

37. IT IS FURTHER ORDERED that the informal objection filed by the National Black Media Coalition regarding all stations in question IS DENIED.

38. IT IS FURTHER ORDERED that the license renewal applications of Stations WAPI(AM)/WAPI-FM filed by WAPI, Inc., and WHBB(AM)/WDXX(FM), filed by Holder Communications Corporation of Alabama ARE GRANTED subject to reporting conditions specified herein.

39. IT IS FURTHER ORDERED that the license renewal application filed by Elton H. Darby for Stations WVNA(AM)/WVNA-FM IS GRANTED subject to reporting conditions specified herein and pursuant to Section 503 of the Communications Act, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $3,000.

40. IT IS FURTHER ORDERED that the license renewal application filed by Radio WBHP, Inc. for Station WBHP(AM) IS GRANTED subject to reporting conditions specified herein and pursuant to Section 503 of the Communications Act, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $9,000.

41. IT IS FURTHER ORDERED that the license renewal application filed by Metro Media Broadcasting, Inc. for Station WQPW(FM) IS GRANTED subject to reporting conditions specified herein and pursuant to Section 503 of the Communications Act, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $15,000.

42. IT IS FURTHER ORDERED that the licensees of the above Stations submit an original and one copy of the following information on December 1, 1991, December 1, 1992, and December 1, 1993:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source for each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[36]

(b) a list of employees as of the November 1, 1991, payroll period for the first report and as of the November 1, 1992 and November 1, 1993 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest to the lowest paid), date of hire, sex, and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

43. In addition, the licensee may submit any information it believes is relevant with regard to the stations' EEO program and its efforts thereunder. The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media Bureau's EEO Branch.

44. Should the licensee have any questions regarding this action or require further information concerning the employment reports, it may call the Mass Media Bureau's EEO Branch (202-632-7069). With respect to the forfeiture proceeding, it may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning its ability to pay should include those financial items set forth in the attachment.

BY DIRECTION OF THE COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] The Order addresses the EEO efforts of WAPI, Inc., licensee of WAPI(AM)/WAPI-FM in Birmingham, Alabama (File Nos. BR-881201XV and BRH-881201XW) (WAPI); Elton H. Darby, licensee of WVNA(AM)/WVNA-FM in Tuscumbia, Alabama (File Nos. BR-881202UJ and BRH-881202UI) (WVNA); Holder Communications Corporation of Alabama, licensee of WHBB(AM)/WDXX(FM), formerly WTUN(FM), in Selma, Alabama (File Nos. BR-881130VP and BRH-881130UX) (WHBB); Metro Media Broadcasting, Inc., licensee of WQPW(FM) in Valdosta, Georgia (File No. BRH-881201ZJ) (WQPW); and Radio WBHP, Inc., licensee of WBHP(AM) in Huntsville, Alabama (File No. BR-881201YI) (WBHP). NAACP/NBMC withdrew its challenge against WLWI(AM)/WLWI-FM, Montgomery, AL; WALR(FM), formerly WAGQ(FM), Athens, AL; and WBBQ(AM)/WBBQ-FM, Augusta, GA. The Commission subsequently granted the renewal applications of these stations subject to admonishments to improve their recruitment efforts. NAACP/NBMC also withdrew its challenge against WWGS(AM)/WSGY(FM), Tifton, GA, and WVVN(AM)/WZYP(FM), Athens, GA, pursuant to settlement agreements. The Commission subsequently granted the renewal applications of WWGS(AM)/WSGY(FM) subject to reporting conditions, a forfeiture of $10,000 and a short term renewal. *See Applications for Renewal of Licenses for Stations WWGS/WSGY (FM), Tifton, Georgia*, 6 FCC Rcd 855 (1991). The Commission has not yet ruled on the renewal applications of WVNN(AM)/ WZYP(FM). NAACP/NBMC challenged two additional stations, WHOS(AM)/ WDRM(FM), Decatur, AL, for which further inquiry was necessary before a ruling on the renewal applications could be made.

[2] The petitioners have not challenged the licensees' employment practices with respect to women. Nonetheless, as is our practice, we reviewed each station's EEO efforts towards both women and minorities. We found sufficient each station's record of EEO efforts towards women.

[3] The Birmingham Times is a black owned and operated newspaper.

[4] Although the licensee states in its renewal application that it contacted these eight sources, its inquiry response does not mention contacting them for any full-time vacancies.

[5] According to the licensee, no detailed records were kept because its self-assessments had detected no significant problems with respect to the implementation of the stations' EEO program.

[6] The licensee also filled 50 positions for "call-out research workers." However, the licensee states that it chose not to include these workers on its renewal application because of the nature of the work involved, sporadic and having nothing to do with the day-to-day operations of the stations, and because including them on the renewal application would have greatly distorted the stations' employment figures due to the high turnover rate of these temporary and part-time positions.

[7] It is unclear from the data submitted how many of these hires were for upper-level positions.

[8] The Birmingham, Alabama Metropolitan Statistical Area is 23.4% minority (22.5% Black, .9% other). The 1989 Annual Employment Report lists five Blacks on an overall staff of 42 (11.9%) and three Blacks on an upper-level staff of 35 (8.7%). Review of the stations' 1988 employment report reveals that the overall full-time staff of 45 included six (13.3%) Blacks while its upper-level staff of 38 persons included three (7.9%) Blacks. In 1987, four (9.1%) Blacks were employed on an overall staff of 44 and two (5.4%) Blacks on an upper-level staff of 37. In 1986, the station employed five (13.2%) Blacks on an overall staff of 38 and four (12.1%) Blacks on an upper-level staff of 33. In 1985, five Blacks worked on the station's overall staff of 35 (14.3%) and three Blacks worked on its upper-level staff of 28 (10.7%). The 1984 report list seven Blacks on an overall staff of 39 (17.9%) and four Blacks on an upper-level staff of 31 (12.9%). The 1983 report lists six Blacks on an overall staff of 33 (18.2%) and four Blacks on an upper-level staff of 28 (14.3%).

[9] This obligation applies to both Station WAPI(AM) and Station WAPI-FM because the licensee filed one EEO program and consolidated annual employment report to reflect its affirmative action efforts at both stations.

[10] WTUN(FM) changed its call letters to WDXX(FM) on July 1, 1989.

[11] Riley College is a predominantly Black technical school.

[12] The licensee's opposition contains letters to these schools dated March 10, 1989. The letters do not describe specific openings but simply state that the stations will be adding to various departments and that they are looking for qualified individuals.

[13] The licensee provided no explanation for why only some and not all of these sources were listed on its renewal application.

[14] The available labor force for Dallas County, Alabama is 44.9% minority (43.7% Black, 1.1% Hispanic, .1% Asian). The stations 1989 Annual Employment Report lists two Blacks on an overall staff of 13 (15.4%) and one Black on an upper-level staff of 11 (9.1%). According to the 1988 employment report, the stations had two (9.5%) Blacks on an overall staff of 21 and two (10%) Blacks on an upper-level staff of 20. The present owner took control of the stations on June 30, 1987.

[15] The licensee provided copies of 141 applications that it had received since taking control of the stations. It states that 64 applicants specifically list the newspaper as their referral source on their applications and many of the remaining applicants when asked how they learned of the organization said in interviews "that they or a friend had seen the ad" in the newspaper. It is unclear, however, how the licensee determined the race of referrals because no indication of race appears on the applications.

[16] The licensee does not explain why it correctly listed, as the application requested, the number of minority *referrals* from the *Selma Times Journal* and incorrectly listed the number of minority *hires* from the Selma City Schools.

[17] In 1987, the station employed two Blacks on an overall and upper-level staff of 20 (10%).

[18] The licensee states in its inquiry response that it hired a Black female for a full-time upper-level position in January 1986. In fact, she was hired part-time as an intern in the news department and later promoted to full-time as assistant news director.

[19] The available labor force for Colbert County, Alabama is 11.6% minority (10.9% Black, 0.7% other). The 1989 Annual Employment Report lists one Black on an overall staff of 14 (7.1%) and no minorities on an upper-level staff of 11. In 1988, the station employed two (11.1%) Blacks on an overall staff of 18 and no minorities on an upper-level staff of 14. Although the 1988 report lists only one Black employee, the stations actually employed two Blacks during the reporting period. In 1987, the station employed one (5.9%) Black on an overall staff of 17 and no minorities on an upper-level staff of 13. In 1986, the station employed one (5.6%) Black on an overall staff of 18 and on an upper-level staff of 16 (6.3%). Although the station's 1986 report lists no full-time minorities at the station, the stations did employ a Black female in an upper-level position during the reporting period. The 1985 report lists no minorities on a full-time staff of 17. In 1984, the station employed one Black on an overall staff of 20 (5%) and on an upper-level staff of 19 (5.3%). In 1983, the station employed one Black on an overall staff of 17 (5.9%) and on an upper-level staff of 15 (6.7%).

[20] On June 22, 1989, after expiration of the license term, an amended renewal application was filed by the licensee providing additional information on its efforts.

[21] The NAACP/NBMC arguments were made in its petition to deny filed more than three months prior to the filing of an amended application which did discuss an internship program.

[22] Although its EEO program contained no minority organizations or minority media, if a licensee obtains a meaningful pool of referrals and applicants from *exclusive* reliance on general sources, it will not be faulted for failing to contact minority specific sources. On the other hand, where a licensee does not obtain meaningful results from general sources and the licensee also failed to contact minority specific sources, questions will be raised concerning the extent to which the licensee has engaged in adequate efforts to obtain minority applicants. *Application of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709 n.8 (1990).

[23] Neither recruitment source is listed in the licensee's inquiry response although both are listed in the licensee's renewal application. In addition, both sources appear in the licensee's proposed list of additional sources to contact in the future.

[24] In an amendment to its renewal application, the licensee reports that for a recent upper-level vacancy, it contacted the expanded list of recruitment sources in its renewal application, received 13 applications, seven of whom were from minorities, and hired a Black female in January 1989.

[25] The Huntsville, Alabama Metropolitan Statistical Area is 18.6% minority (16.9% Black, 1.7% other). The station employed no minorities in upper-level positions during the license term on upper-level staffs that ranged in size from 12 to 20. The station's 1988 and 1989 Annual Employment Reports list one Black on an overall staff of 22 (4.5%). In 1987, the station

employed one Black on an overall staff of 20 (5%). In 1986, the station employed one Black on an overall staff of 16 (6.3%). The 1985 report lists one Black on an overall staff of 14 (7.1%). In 1984, the station employed one Black on an overall staff of 17 (5.9%) and in 1983, the station employed one Black on its overall staff of 16 (6.3%).

[26] The station changed its call letters from WLGA(FM) to WQPW(FM) on October 10, 1988.

[27] Valdosta Technical Institute has a minority enrollment of 22% and Valdosta State College has a minority enrollment of 15%.

[28] The licensee indicates that it stopped contacting one of the employment agencies, Career Consultants, because it produced no minority referrals.

[29] The licensee provided referral cards from two employment agencies in which it listed specific job openings. However, both cards were from 1982, outside the license term under review.

[30] It appears from the data that some of the same minority applicants were in multiple applicant pools.

[31] It is unclear how many applicants were minorities because, although the licensee provided the gender and race for all interviewees, it did not provide this information for all applicants.

[32] Two minorities were hired in July 1988 and one was hired in August 1988, the last year of the license term.

[33] The available labor force in Lowndes County, Georgia is 28.0% minority (26.3% Black, 1.1% Hispanic, .5% Asian, .1% American Indian). The 1984, 1987, 1988, and 1989 Annual Employment Reports list no minorities working at the station on overall staffs ranging in size from 14 to 19. In 1986, the station employed one (6.7%) Asian on an overall staff of 14 and on an upper level staff of 13 (7.7%). In 1985, the station employed one (7.1%) Asian on an overall staff of 14 and on an upper-level staff of 12 (8.3%). In 1983, the station employed one (10%) Asian on an overall staff of 10 and on an upper-level staff of 7 (14.3%).

[34] The licensee provides copies of the letters sent to these sources in March, 1989, the last month of the license term. However, like the ads previously noted, these letters did not contain any information about specific openings at the station. The licensee simply asks the sources to submit applications to the station on a continuing basis so that when jobs become available the station would be ready for hiring.

[35] In some cases, a licensee may rely on applications on file in lieu of affirmatively recruiting for a particular position. However, the licensee must take adequate steps to ensure that applicant pools drawn from applications on file contain a diverse group of candidates. Furthermore, a licensee must be able to demonstrate that such applications were gathered in accordance with our EEO Rule.

[36] Such a list might start:

1. News Director: Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-328

In re Applications of

MAGDALENE GUNDEN PARTNERSHIP	File No. BPCT-850607KK
NORTH BAY TELEVISION, INC.	File No. BPCT-850725LC
MARIN TV SERVICES PARTNERS, LIMITED	File No. BPCT-850725LE

For Construction Permit for a
New Television Station
Novato, California

MEMORANDUM OPINION AND ORDER

Adopted: October 9, 1991; Released: October 22, 1991

By the Commission:

1. This matter is before us upon remand from the United States Court of Appeals for the District of Columbia Circuit. The court found it unclear on the record before it whether the Commission has a rule that would prevent a limited partner from providing legal services to the applicant without attribution of its equity interest for the purpose of evaluation of the applicant's ownership integration proposal. *Marin TV Services Partners, Ltd.*, 936 F.2d 1304 (D.C. Cir. 1991). This ambiguity grew out of the court's interpretation of the Commission's prior rulings in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), and *Clarification of Ownership Attribution*, 1 FCC Rcd 802 (1986). Contrary to the Commission's rulings in *Clarification of Ownership Attribution* and this case, the court read *Victory* to suggest that the provision of legal services to the applicant by passive owners would not require attribution. Moreover, the court found that the uncertainty created by *Victory* was not resolved by *Coast TV*, 5 FCC Rcd 2751, 2752 ¶ 15 (1990), which overruled *Victory*'s holding that a passive investor's participation in the application process is irrelevant in determining whether the investor will exert control.

2. On August 12, 1991, the Office of General Counsel requested comments of the parties in this proceeding relating to the Commission's determination that Marin TV Services Partners, Limited (Marin) was not entitled to full integration credit.

3. Before us now are comments filed by Marin and North Bay Television, Inc. (North Bay) on August 19, 1991 and reply comments filed by Marin on August 26, 1991. For the reasons that follow, we reaffirm our decision in this case.

4. It is well established that in order to avoid attribution of their interests for the integration of ownership and management analysis, "limited partners are required to maintain a purely passive role." *Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981). In clarifying the elements of that passivity, we have said:

> Moreover, with the exception of permitting a limited partner to make loans to, or act as a surety for the business, the agreement should also bar the exempt limited partner from performing *any* services to the limited partnership materially relating to its media activities.

Ownership Attribution Reconsideration Order, 58 RR 2d 604, 620 (1985) (emphasis added).

5. Although *Ownership Attribution* dealt with multiple ownership questions, the "no material involvement" safeguards established therein are mandatory in the setting of comparative licensing cases. *Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934-35 & n.6 (1986). Moreover, we have ruled that legal services provided in connection with the representation of a client in a comparative hearing are covered by the "any services" proscription. *Clarification of Ownership Attribution*, 1 FCC Rcd at 804 ¶ 15.

6. Marin argues, however, that *Clarification of Ownership Attribution* (sometimes *Clarification Order*), by its own terms, "implicates only limited partners who provide legal services as a substitute for financial contribution to the limited partnership." Marin Comments, p. 5. Consequently, Marin claims that the *Clarification Order* did not address the situation, presented here, in which "an officer/director of a [corporate] limited partner provides legal services under an ordinary fee arrangement." *Id.*

7. Marin's interpretation is wrong. The operative element of the proscription in the *Clarification Order* is the provision of services, not the form of compensation received for the services. There we stated:

> [T]he partnership agreement should bar an exempt limited partner from providing "any" services which materially relate to the media activities of the partnership. . . . [I]t would be difficult to envision legal services that are more directly related to the media activities of the partnership than those concerning the licensing and operation of broadcasting entities.

Clarification Order, 1 FCC Rcd at 804 ¶ 15.[1] Marin has presented no authority or persuasive argument to warrant a distinction concerning the provision of services on the basis of the form of the compensation received.

8. The court's opinion remanding this case to the Commission is not to the contrary on this point. As the court stated:

> If *Clarification of Ownership Attribution* stood alone, we would have little reason to question the Commission's decision to deny integration credit. The policy stated in *Clarification of Ownership Attribution* is reasonable and neatly fits the facts of this case.

Marin TV Services Partners, Ltd., 936 F.2d at 1309. Nonetheless, the court questioned the applicability of our ruling in the *Clarification Order* in light of *Victory*, which the court interpreted as holding that the provision of legal services by passive investors does not relate to broadcasting and consequently does not indicate that the nominally active owner will have less than exclusive control of the station's management in the future. *Id.* Furthermore, although *Coast TV* overruled the holding of *Victory* that a passive investor's participation in the applicant's activities is irrelevant in determining whether the investor will exert control, the court noted that *Coast TV* did not address whether the provision of legal services constitutes such "participation." *Coast TV*, at 2753 n.3.

9. It was our intent in *Coast TV*, in overturning our previous holding in *Victory*, to treat *all* post-formation involvement by passive owners as participation in the application process. To this end we said:

> [I]ntegration credit is due when the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out. *See, e.g., Pacific Television, Ltd.*, 3 FCC Rcd 1700, 1700 ¶ 5 (1987) (citing *Bradley, Hand & Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982).

5 FCC Rcd at 2752 ¶ 8. Thus, "where a 'passive' owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes," because such activity by an owner in the face of organizational documents or other claims indicating passive status "sharply undermines the owner's claim to passive treatment." 5 FCC Rcd at 2752-3 ¶ 15 and n.3.

10. In *Coast TV*, the limited partnership agreement was signed prior to the filing of the application. Notwithstanding the agreement, the "limited" partners continued to engage in activities with respect to initiating the application and arranging for its financing. *Id.* at ¶ 9. Thus, having failed to provide "reasonable assurance that the plan will be carried out," i.e., that the general partners will be the exclusive full-time managers of the applicant as represented, we concluded that no reliance could be placed on the adequacy of the agreement's insulation provisions in the future.

11. By the same token, provision of legal services by "limited" partners after the formation of the partnership (which "directly relate to the media activities of the partnership," *Clarification, supra*), similarly impugns the future reliability of any insulation provisions in the agreement and equally warrants consideration of such an owner's interest for comparative purposes. *Victory* did not deal with the question of whether the passive owners' continued provision of legal services to the applicant after it filed an application representing that these owners would have a passive role was inconsistent with the applicant's business structure. *Id.* at ¶ 14. The provision of legal services was not a part of the factual situation before us in *Coast TV*. Thus, we had no occasion in *Coast* to restate specifically our holding in *Clarification* that post-formation legal services by a "limited partner" warranted attribution. By the same token, those cases were not intended to affect our holding in *Clarification*, and we find no basis now to conclude that legal services should be treated differently from any other service relating to a partnership. Accordingly, the provision of legal services by passive owners after adoption of the applicant's organizational structure are attributable to the applicant.[2]

12. Finally, we need not consider whether a review of the "totality of the cicumstances" surrounding Marin's formation might also lead to a similar conclusion, because the provision of legal services by the limited partner, BEI, to Marin, standing alone, precludes Marin from receiving more than ten percent integration credit. Similarly, we need not and will not address other arguments submitted by Marin because they have been disposed of in prior decisions in this case or do not relate to the narrow question before us.

13. ACCORDINGLY, IT IS ORDERED, That, consistent with the reasons stated herein, the Commission's previous Orders in this proceeding, 3 FCC Rcd 7186 (1988) and 5 FCC Rcd 2509 (1990), upholding the Review Board's grant of the application of North Bay Television, Inc. for a new television station to operate on Channel 68 at Novato, California, ARE REAFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The provision of legal services, even under an ordinary fee arrangement, would, in most instances, constitute a contractual or agency relationship between the limited and general partner, clearly prohibited by our *Attribution Reconsideration Order*, where we stated:

> We will also require the limited partnership agreement to bar an exempt limited partner from serving, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises.

58 RR 2d 604, 619 (1985).

[2] Marin again argues, as it did previously to us and the court, that the services of a member of the law firm representing Marin should not, by virtue of another member's short, ministerial service as an officer and director of BEI, Marin's limited partner, cause BEI's interest to be attributed to Marin. However, this argument did not play a part in the court's decision to remand the case. On the contrary, as noted in paragraph eight above, the court held that our *Clarification* policy is reasonable and "neatly fits the facts of this case." Thus, there is no reason to revisit Marin's argument here.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-561

In the Matter of

Miscellaneous Amendments	RM-7241	RM-7243
to Part 97 of the Rules	RM-7242	RM-7244
Governing the Amateur		
Radio Services.		

REPORT AND ORDER

Adopted: October 8, 1991; Released: October 23, 1991

By the Commission:

I. INTRODUCTION

1. On November 5, 1990, we adopted a *Notice of Proposed Rule Making* (*Notice*) [1] in the above-captioned proceeding. In the *Notice*, we proposed a series of unrelated amendments in the rules for the Amateur Radio Services (47 C.F.R. Part 97). In response to the *Notice*, we received comments from The American Radio Relay League, Inc., (ARRL), The Radio Amateur Satellite Corporation, (AMSAT), Mr. David C. Bland (Bland), and Mr. Kenneth E. Woodard (Woodard). No reply comments were received.

II. BACKGROUND

2. The *Notice* proposed generally minor rule changes. The proposed changes reflect preferred terminology and clarify technical standards and operational requirements. The proposed amendments were intended to provide a more meaningful, easy-to-use body of regulations. The comments were generally supportive of the proposed rule amendments. This *Report and Order* adopts the rule amendments proposed in the *Notice* with the changes discussed below.

III. DISCUSSION

3. *Terminology*. In the *Notice* we proposed to define the terms "telecommand," "telemetry," and "space telemetry" and to delete the reference to frequency drift and Doppler shift in the definition for the term "bandwidth" in Section 97.3 of the Commission's Rules, 47 C.F.R. § 97.3. The ARRL agrees with the proposed changes.[2] While AMSAT also voices support, it suggests that the definition for the term "space telemetry" be more closely conformed with Section 97.207(f) of the Commission's Rules, 47 C.F.R. § 97.207(f).[3] We agree. We are, therefore, adopting the amendments as proposed with the exception of the definition of "space telemetry." We are defining this term to conform with Section 97.207(f) as suggested by AMSAT.

4. *Amateur operator compensation*. Section 97.113(b) of the Commission's Rules, 47 C.F.R. § 97.113(b), prohibits any amateur station from transmitting messages for hire or compensation with one exception. This exception allows the control operator of a club station to accept compensation during the time the club station is transmitting telegraphy practice or information bulletins when the club station satisfies four requirements. One of the requirements is that the club station transmit telegraphy practice or information bulletins on all amateur service MF and HF bands. This exception was requested by the ARRL primarily for W1AW and, to the best of our knowledge, it is, and has been, used only by the ARRL.[4]

5. We proposed to amend Section 97.113 to reduce from ten to six the number of MF and HF bands for which a club station must schedule one-way telegraphy practice or information bulletin transmissions in order for its control operator to accept compensation.[5] The ARRL states that operation on six bands is sufficient to maximize coverage. The ARRL further suggests that simultaneous transmissions be required on the six bands as a means of limiting such compensation to control operators at stations transmitting *bona fide* one-way telegraphy practice and information bulletins.[6]

6. We will accept the ARRL's claim that operation on six bands, as requested in 1974, is sufficient to provide their desired coverage. This change, additionally, should benefit other licensees. Because fewer channels will be used for one-way telegraphy practice and information bulletin transmissions than required by the present rule, more channels will be available for the use of other licensees. We will not adopt the ARRL's suggestion to require simultaneous transmissions because the ability to transmit on multiple frequencies simultaneously is not proof a station is a *bona fide* telegraphy practice or information bulletin station. We are, therefore, adopting the rule amendment as proposed.

7. *Station identification*. We asked for comment regarding the station identification requirements in Section 97.119 of the Commission's Rules, 47 C.F.R. § 97.119. We also asked whether this section should be amended to require a station to identify at the beginning of a communication through a repeater.[7] We did not, however, make any specific proposal. The only comment received strongly opposed any change to station identification requirements. Bland argues that it would be inappropriate, unnecessary, and regressive. He believes that numerous proven methods to prevent unwanted access to a repeater station already exist and that changing the current rules would negatively impact certain types of amateur communications.[8] We concur with Bland's rationale. We, therefore, are not adopting changes to the station identification requirements.

8. *Auxiliary station*. In the *Notice*, we proposed to amend Section 97.201 of the Commission's Rules, 47 C.F.R. § 97.201, to delete the condition that an auxiliary station can be automatically controlled only when it is part of a repeater system.[9] Generally, we encourage automatic control wherever the use of devices and procedures for control of an amateur station ensures that compliance with the rules is achieved. The ARRL supports this amendment because it would allow experimentation with new system configurations.[10] We concur and, therefore, are adopting the amendments as proposed.

9. *Space station telemetry transmissions.* In Section 97.207 of the Commission's Rules, 47 C.F.R. § 97.207, we proposed to expand the permissible types of space telemetry transmissions to include transmissions of specially coded messages intended to facilitate communications.[11] The AMSAT concurs.[12] The ARRL also supports the proposed change stating that this amendment will provide significantly greater flexibility for the Amateur Satellite Service than does the present rule.[13] We agree and, therefore, are revising the rule as proposed.

10. *Remote Control.* We proposed a number of minor technical amendments, including revising section captions and changing the term "remote control" to "telecommand" in Sections 97.211, 97.213 and 97.215 of the Commission's Rules, 47 C.F.R. §§ 97.211, 97.213 and 97.215, to clarify the application of the rule.[14] The ARRL supports these amendments.[15] These changes will make these rules easier to use and more easily understood by amateur operators. We will, therefore, adopt the amendments as proposed. Additionally, Woodard requests that the time allowed before a malfunctioning remotely controlled station must cease transmissions be extended to ten minutes.[16] Ideally, any amateur station should be removed from the air immediately upon a violative malfunction. The current three minute allowance is a reasonable compromise that has been implemented in countless automatically controlled stations. We will not modify the rules as requested by Woodard.

11. *Digital Codes.* We proposed to include the terms, ASCII, AMTOR, and Baudot, popularly used by amateur operators for the digital codes defined in Section 97.309 of the Commission's Rules, 47 C.F.R. § 97.309, in the definitions.[17] There were no objections. We are, therefore, revising the rule as proposed. The inclusion of these familiar terms will make the rules easier to use and understand.

IV. CONCLUSION

12. In summary, we are adopting a series of minor rule amendments, including changes in terminology, technical standards, and operating requirements, to the rules for the Amateur Radio Services. Our objective is to make the rules more understandable and useful to licensees by having rules that reflect preferred terminology, clarify the application of a rule, or assist licensees in understanding a rule.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that effective **December 16, 1991,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth in the Appendix below. Authority for this action is found in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(c) and (r).

14. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

VI. COMMISSION CONTACT

15. For further information regarding this proceeding, contact William T. Cross of the Personal Radio Branch, Private Radio Bureau at (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulation is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.3 is amended by revising paragraph (a)(8), by redesignating paragraphs (a)37, (a)38, (a)39, (a)40, and (a)41 as paragraphs (a)38, (a)40, (a)42, (a)43 and (a)44 respectively, and by adding new paragraphs (a)37, (a)39, and (a)41 to read as follows:

§ 97.3 Definitions.

(a) * * *

(8) *Bandwidth.* The width of a frequency band outside of which the mean power of the transmitted signal is attenuated at least 26 dB below the mean power of the transmitted signal within the band.

* * * * *

(37) *Space telemetry.* A one-way transmission from a space station of measurements made from the measuring instruments in a spacecraft, including those relating to the functioning of the spacecraft.

(39) *Telecommand.* A one-way transmission to initiate, modify, or terminate functions of a device at a distance.

(41) *Telemetry.* A one-way transmission of measurements at a distance from the measuring instrument.

* * * * *

3. Section 97.111 is amended by revising paragraph (b)(3) and by adding new paragraph (b)(7) to read as follows:

§ 97.111 Authorized transmissions

* * * * *

(b) * * *

(3) Telecommand.

* * * * *

(7) Transmissions of telemetry.

4. Section 97.113(b)(2) is revised to read as follows:

§ 97.113 Prohibited transmissions.

* * * * *

(b) * * *

(2) The station schedules operations on at least six amateur service MF and HF bands using reasonable measures to maximize coverage;

* * * * *

5. Section 97.201(d) is revised to read as follows:

§ 97.201 Auxiliary station.

* * * * *

(d) An auxiliary station may be automatically controlled.

* * * * *

6. Section 97.207(f) is revised to read as follows:

§ 97.207 Space station.

* * * * *

(f) Space telemetry transmissions may consist of specially coded messages intended to facilitate communications or related to the function of the spacecraft.

* * * * *

7. The heading of Section 97.211 is revised to read as follows:

§ 97.211 Space telecommand station.

8. Section 97.213 is amended by revising the heading and the introductory text to read as follows:

§ 97.213 Telecommand of an amateur station.

An amateur station on or within 50 km of the Earth's surface may be under telecommand where:

* * * * *

9. The heading of Section 97.215 is revised to read as follows:

§ 97.215 Telecommand of model craft.

10. New Section 97.216 is added to read as follows:

§ 97.216 Telemetry.

Telemetry transmitted by an amateur station on or within 50 km of the Earth's surface is not considered to be codes or ciphers intended to obscure the meaning of communications.

11. Section 97.309(a) is revised to read as follows:

§ 97.309 RTTY and data emission codes.

(a) Where authorized by §§ 97.305(c) and 97.307(f) of this Part, an amateur station may transmit a RTTY or data emission using the following specified digital codes:

(1) The 5-unit, start-stop, International Telegraph Alphabet No. 2, code defined in International Telegraph and Telephone Consultative Committee Recommendation F.1, Division C (commonly known as Baudot).

(2) The 7-unit code specified in International Radio Consultative Committee Recommendation CCIR 476-2 (1978), 476-3 (1982), 476-4 (1986) or 625 (1986) (commonly known as AMTOR).

(3) The 7-unit code defined in American National Standards Institute X3.4-1977 or International Alphabet No. 5 defined in International Telegraph and Telephone Consultative Committee Recommendation T.50 or in International Organization for Standardization, International Standard ISO 646 (1983), and extensions as provided for in CCITT Recommendation T.61 (Malaga-Torremolinos, 1984) (commonly known as ASCII).

* * * * *

FOOTNOTES

[1] *See* Notice of Proposed Rule Making, PR Docket No. 90-561, 5 FCC Rcd 7658 (1990).

[2] Comment of ARRL at 2.

[3] Comment of AMSAT at 2-3.

[4] *See Report and Order*, Docket No. 19605, 45 FCC 2d 543 (1974).

[5] *See Notice*, para. 9.

[6] Comment of ARRL at 9-10.

[7] *See Notice*, para. 11.

[8] Comment of David Bland at 1-3.

[9] *See Notice*, para. 13.

[10] Comment of ARRL at 10.

[11] *See Notice*, para. 14.

[12] Comment of AMSAT at 2.

[13] Comment of ARRL at 11.

[14] *See Notice*, para. 15.

[15] Comment of ARRL at 11.

[16] Comment of Kenneth E. Woodard at 1.

[17] *See Notice*, para. 17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-43

In re Applications of

SUNSHINE BROADCASTING, INC. File No. BPH-870625MI

HARTSVILLE BROADCASTING CO., INC. File No. BPH-870629NC

For Construction Permit for
New FM Station, Channel 253A,
Hartsville, South Carolina

Appearances

Jerrold Miller, on behalf of Sunshine Broadcasting, Inc.; and *Matthew H. McCormick* and *Cheryl A. Kenny*, on behalf of Hartsville Broadcasting Co., Inc.

DECISION

Adopted: October 17, 1991; Released: October 24, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision*, 6 FCC Rcd 2613 (1991) (I.D.), of Administrative Law Judge Joseph Chachkin (ALJ), as well as the exceptions and replies thereto filed by the captioned parties. Oral argument was heard by the Board on September 27, 1991.

2. In addition to the standard comparative issue, the proceeding below was heard on the following basic qualifications issues specified against Sunshine Broadcasting, Inc. (Sunshine), added by the ALJ by *Memorandum Opinion and Order*, FCC 90M-2254, released July 26, 1990:

> 1. To determine whether Sunshine Broadcasting, Inc. is financially qualified to be a Commission licensee.
>
> 2. To determine whether Sunshine Broadcasting, Inc. has misrepresented facts or lacked candor in certifying it is financially qualified.
>
> 3. To determine whether Sunshine Broadcasting, Inc.'s specification, in its application, of its currently proposed transmitter site constitutes a misrepresentation and/or lack of candor.
>
> 4. To determine whether, in light of the evidence adduced under the foregoing issues, Sunshine Broadcasting, Inc. is basically qualified to be a Commission licensee.

The ALJ adversely resolved only Issue 1 against Sunshine, and further determined that even if Sunshine were not otherwise disqualified it could not prevail over its competitor, Hartsville Broadcasting Co., Inc. (Hartsville) on a comparative basis. Except as modified herein, the Board affirms the ALJ's resolution of this proceeding.

FINANCIAL QUALIFICATIONS

3. The ALJ ultimately determined that Sunshine was not currently financially qualified to construct and operate as proposed. I.D., paras. 66- 67. However, it was held that Sunshine was financially qualified at the time it filed its application, *id.*, at paras. 62-65, because Sunshine principals Gray and Orr had a "verbal agreement" that if Orr (who had promised to "share equally" all costs involved with Gray) was "unable to come up with the necessary funds to meet his 50% contribution, Gray would loan Orr the money which Orr would, in turn, loan to Sunshine." *Id.*, paras. 42, 44.

4. Sunshine concedes that it no longer relies upon its initially-proposed plan for funding the construction and operation of its facility. Indeed, Sunshine further concedes that it became financially unqualified for a period of time exceeding 30 days during the pendency of its application. *See* Transcript of Oral Argument, Tr. 807-811. (Sunshine also concedes that it did not notify the Commission of this fact, nor did it attempt to amend its financial certification. *Id.*) However, before we address Sunshine's exceptions to the ALJ's resolution of Issue 1 and Sunshine's modified financial proposal, it must be first determined whether it was financially qualified at the time Sunshine filed its application, because the Commission has made abundantly clear that a modified financial proposal cannot be relied upon in the absence of a showing that the applicant "had reasonable assurance of necessary financing at the time it filed its application." *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603 (1991); *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990) (applicant found not financially qualified where it failed to demonstrate "reasonable assurance" of a loan commitment from a bank at the time its application was filed); *accord REM Malloy Broadcasting*, FCC 91R-90, adopted October 4, 1991.

5. HBC excepts to the ALJ's determination that Sunshine was financially qualified at the time it filed its application in light of Orr's deposition testimony that "no decision regarding the percentages he and Gray would loan Sunshine" had been made. HBC Exceptions at p. 5; Tr. 535-536. Sunshine, in reply, asserts only that Orr's deposition answer "was not an accurate response" and that Orr's claim that he was focusing on "written documentation" (sic), is "entirely credible." Sunshine Reply at p. 2. We agree with HBC that Orr's *post-hoc* rationalization at hearing that he had "understood" the deposition questioning to refer to a "written agreement" between him and Gray is not credible in light of the deposition questions (which merely inquired as to whether any "decision" or "arrangement" had been made with respect to loans from Gray). Additionally, Orr was unable, when asked, to reference any part of the deposition transcript which would have allowed him to maintain such a "misunderstanding." *See* Tr. 535-357. Further, we agree with HBC that the record does not disclose even the most rudimentary terms of the proposed "verbal" loan agreement between Gray and Orr, including principal

amount or interest. *See* Tr. 296, 299, 539-541, 553. No specific term of repayment was discussed between the two principals (other than that Gray did not want repayment to take more than 5 years). Tr. 540. Thus, we can find no "reasonable assurance" of the proposed loan from Gray to Orr, and, therefore, Sunshine cannot be determined to be financially qualified at the time it filed its application. *See Marlin Broadcasting of Central Florida, Inc., supra.* As a result, it could not rely on its modified financial proposal. *See Aspen FM, supra.*

6. Even assuming, *arguendo*, that Sunshine had demonstrated that it was initially financially qualified (and could thus rely on its modified financial proposal), the record reveals that the ALJ's resolution of Sunshine's current financial qualifications was correct. In the I.D., the ALJ determined (at paras. 50-55):

> To meet [its now proposed] costs, Sunshine will rely on Gray and Orr. Gray will, however, contribute only $25,000, to construction and initial operating costs; Orr will contribute $60,000. Tr. 135, 222-223, 514, 541. Gray and Orr will continue to share equally the prosecution expenses. Tr. 594-595. Gray's financial posture changed in approximately May 1990 when he began selling off his assets to finance the construction of his 10,000 watt, four tower directional array at station [WSML], Graham, North Carolina. Tr. 179-182.
>
> Gray proposes to rely on a $25,000 loan from his mother. The loan letter dated August 22, 1990 provides that the loan is payable over 36 months at interest of 8% with first principal and interest payments due 12 months from the date the loan was made. The source of the funds to be loaned to Gray are certificate[s] of deposit in the amounts of $15,000 and $10,500. Sunshine has provided evidence of the existence of such funds. Sunshine Exhibit 5, pp. 9-11. However, Sunshine has not submitted a financial statement for Mrs. Gray. In the absence of information as to Mrs. Gray's liabilities, no determination can be made as to whether she has sufficient net liquid assets to cover the loan.
>
> To meet his $60,000 commitment, Orr proposes to rely on the following sources: a $30,000 bank loan from the South Carolina National Bank, an $8,000 loan from his wife, Patsy Orr, and a $22,000 loan from his parents, Marvin and Marilyn Orr. Sunshine Exhibit 4.
>
> The $30,000 from the bank loan will be credited. Orr's loan commitment is evidenced by bank letters dated August 7, 1990 and September 6, 1990 signed by J. D. Yarborough, Asst. Vice president. The letters establish that Orr has done business with the bank for a number of years and has compiled an excellent financial record. Further, the letters provide the amount of the loan, the interest rate, the repayment terms, and the collateral. The collateral will be a second mortgage on the Orr residence and the personal guarantees of the Orrs, which they have agreed to provide. The Orr property already is encumbered by a second mortgage. However, the September 6 letter increases the loan amount to $36,000. Of the amount borrowed, approximately $4700 would be used to pay off the existing second mortgage, to be done at the closing of the bank loan. The bank letter also notes that the bank has received an acceptable appraisal of Orr's residence, appraising the property at $128,400. Sunshine Exhibit 4, pp. 7-9; Sunshine Exhibit 9; Tr. 465-466.
>
> Funds for the $8,000 loan from Mrs. Orr to her husband are to come from her retirement account and her savings account. Sunshine Exhibit 4, pp. 4-6; Tr. 467. As of March 31, 1990, Patsy Orr had a balance of $7,310 in her retirement account. Sunshine Exhibit 4, p. 5. She had a balance in her savings account of $748. Sunshine Exhibit 4, p. 6. Her commitment states that no interest will be charged and no collateral will be required. The loan is to be repaid one year after the station goes on the air. Sunshine Exhibit 4, p. 3. Sunshine, however, has not provided a financial statement for Mrs. Orr.
>
> Marvin and Marilyn Orr propose to lend Michael Orr $26,000 for use in construction and operation of the Hartsville station. Sunshine Exhibit 4, pp. 10-11; Tr. 472, 492, 501. No collateral will be required, no interest will be charged, and repayment need not be made until the station has been on the air for a year. Sunshine Exhibit 4, p. 11. The Orrs will obtain the funds for their loan from accounts at the Wachovia Bank ($6,544), Ecusta Employees Credit Union ($6,780 and $11,172) and at the First Union Bank ($2,134). The balances total $26,630. Sunshine Exhibit 4, pp. 11-15. Sunshine, however, has not provided a financial statement for Orr's parents. In the absence of information as to the liabilities of his parents and Orr's wife, it is not possible to ascertain whether they have sufficient net liquid assets to cover the loans. As in the case of Mrs. Gray, their loan commitments will not be credited.

7. The application form utilized by Sunshine (*see* FCC Form 301, Instructions, Section III) contained the following requirements:

> An applicant for a new station must certify that it has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue. In so certifying, the applicant is also attesting that it can and will meet all contractual requirements, if any, as to collateral, guarantees, and capital investments.

Additionally, Question 1 of Section III, FCC Form 301, clearly states (emphasis added):

> 1. The applicant certifies that *sufficient net liquid assets are on hand or are available from committed sources* to construct and operate the requested facilities for three months without revenue.

See REM Malloy Broadcasting, supra; *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991), *recon. dismissed*, 6 FCC Rcd 4626 (1991); *see also JAM Communications, Inc.*, 4 FCC Rcd 3754, 3757 (Rev. Bd. 1989).

8. Here, in the conceded absence of any financial statements, it is impossible to determine whether the individual lenders (relatives of Gray and Orr) actually possess the required "net liquid assets" necessary to fund the proposed loans. Sunshine argues that these funds have been "earmarked" by the prospective individual lenders and that their testimony that they have the "net liquid assets" readily available should suffice. Sunshine Exceptions at pps. 2-5. We disagree. In *Aspen FM, Inc., supra*, 6 FCC Rcd at 1603, where an applicant had not reviewed a balance sheet or financial statement evidencing the proposed lenders' financial ability to meet his loan commitment, the Commission declared:

> [A]s the Commission indicated in *Northampton [Media Associates*, 4 FCC Rcd 5517 (1989); subsequent history omitted], the applicant must demonstrate that it had taken the necessary steps to ascertain that the lender, when not a financial institution, has sufficient financial resources to meet his loan commitment . . . .

9. For all the foregoing reasons, we agree with the ALJ that Sunshine has not adequately demonstrated that it is currently financially qualified. Further, as noted *supra*, para. 2, the ALJ also held that even if Sunshine was otherwise qualified to be a licensee, it still could not prevail over HBC on a comparative basis. Therefore, we will now address this aspect of Sunshine's application.[1]

COMPARATIVE CONSIDERATIONS

10. *Diversification of Media Interests* : "Diversification is a factor of primary significance since . . . it constitutes a primary objective in the [Commission's] licensing scheme." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965) (*1965 Policy Statement*). The appropriate weight to be given media interests varies according to the type of media, size of ownership interest, and the impact of that media on the community of license and the proposed service area. *Caldwell Broadcasting Corp.*, 104 FCC 2d 438, 439 (1986). Ownership of small mediums of expression, such as weekly newspapers with less frequent publication, have less significance than other broadcast interests. *Caldwell, supra*; *1965 Policy Statement*, 1 FCC 2d at 394-395; *Barton Broadcasting*, 104 FCC 2d 785 (Rev. Bd. 1986).

11. Sunshine does not except to the ALJ's determination that, under the important diversification criterion: (1) it must be charged for Michael Orr's 100% ownership interest in WCRE, Cherew, South Carolina (located some 37 miles distant from Hartsville). Orr is President/Treasurer/Director of Sunshine, and 41.7% owner of the common voting stock of that applicant; and (2) it must be charged with the 100% ownership interest of Sunshine's other 41.7% shareholder/Vice President/Secretary/Director Theodore J. Gray, Jr. in WSML(AM), a 10kw (daytime hours) facility, at Graham, North Carolina (located some 120 miles distant from Hartsville).

12. With respect to HBC, the ALJ determined that two of HBC's non-integrated principals, who hold a combined ownership interest of 36.2% in HBC, together own the Hartsville Publishing Co., publisher of *The Hartsville Messenger*, a twice-weekly Hartsville newspaper. The average 1990 circulation for *The Hartsville Messenger* is less than 5500 on Mondays, and less than 7500 on Wednesdays. *The Hartsville Messenger* is one of three non-daily newspapers in Hartsville, and there are three other *daily* newspapers with regular circulation in Darlington County, South Carolina (where Hartsville is located).

13. The ALJ assessed Sunshine a "substantial diversification demerit" for its principals' ownership interests in other broadcast media. I.D., para. 70. Conversely, HBC was assessed a "very slight diversification demerit" for the ownership interests of two non-integrated HBC principals in the Hartsville Publishing Co. I.D., para. 71. In its exceptions (pps. 6-10), Sunshine argues that the "very slight" demerit assessed HBC by the ALJ was in error, and that "at a minimum, the overall diversification goals of the Commission would be met about equally by the competing applicants." *Id.*, at p. 10. HBC, on the other hand, argues that it should not be charged with even the "very slight" demerit assessed by the ALJ. HBC Exceptions at pps. 28-29.

14. In *Barton Broadcasting Co., supra*, 104 FCC 2d at 787 (Rev. Bd. 1986), *recon. denied*, FCC 86R-58, released September 18, 1986, the Board held:

> With regard, first, to the weight to be given [the applicant's in-town weekly newspaper wholly-owned by a 49% shareholder], we believe this interest is essentially *de minimis* - that is, it does not have any meaningful adverse impact on the Commission's diversification policies . . . . In fact, the Commission, while it will consider a non-daily circulation newspaper as a diversification factor, normally will give little weight to such interests. *See, e.g., Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 648 (Rev. Bd.), *recon. denied*, FCC 83R-38, released May 13, 1983; *rev. denied*, FCC 84-161, released April 13, 1984 (subsequent history omitted) (minority stockholder's ownership of a weekly newspaper in nearby community deemed marginal and *de minimis*-no preference awarded); *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982), *modified*, FCC 84-72, released March 15, 1984 (limited partner's ownership of local monthly magazine "would not adversely affect local diversification of mass media"); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976) (weekly newspaper with small local distribution not a significant factor).

See also Big Bend Broadcasters, 96 FCC 2d 166 (Rev. Bd. 1983), *rev. denied*, FCC 84-645, released December 26, 1984.

15. While there is no extant precedent precisely "on all fours" with the unique diversification circumstances present here (twice-weekly local newspaper owned by non-integrated principals *versus* nearby broadcast facilities), the Board, in weighing the diversification factors between non-daily newspaper interests and other ownership in broadcast stations, finds that even if we were to, at best, slightly increase HBC's diversification demerit and modestly decrease the same demerit assessed Sunshine, HBC, on balance, would still clearly prevail on the all-important diversification factor. *See Big Bend, supra*, 96 FCC 2d at 169 (while the Commission will consider a non-daily newspaper as a diversification factor, it will not accord it anything close to equivalent weight when compared with a broadcast station).

16. *Integration into Ownership/Management*: The ALJ awarded Sunshine a "moderate" integration preference because Sunshine was credited with a 58.4% ownership interest for its two principals who propose to be involved with the station on a full-time basis. Conversely, HBC was awarded 16.7% full-time integration credit for its sole principal who proposes to be General Manager of its facility. While both parties argue that the integration credit awarded its respective competitor must be reduced, neither excepts to the maximum integration credit awarded by the ALJ to their own applications. In any event, it is long-held Commission policy the diversification criterion is to be afforded greater comparative weight than the integration factor. *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976); *Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 1202-1203 (Rev. Bd. 1983). Thus, even with the disparity in integration credit awarded here, the significant diversification preference awarded HBC results in it being declared the clear comparative winner in this proceeding.

17. *Other Comparative Factors:* The ALJ made findings regarding other comparative factors delineated in the *1965 Policy Statement*, including local residence, broadcast experience, participation in civic activities, and auxiliary power. However, no conclusions were made pertaining to these factors, and neither party has argued that these other factors affect the ultimate resolution here.

OTHER MATTERS

18. For the additional reasons set forth above, we have affirmed the ALJ's disqualification of Sunshine on the financial issue. However, even if we were to reverse the ALJ in this regard, Sunshine still could not prevail comparatively. Further, it should also be noted that if Sunshine were comparatively preferred, the Board determines that it would be required to remand this proceeding on other outstanding substantial and material questions of fact that the record presents concerning Sunshine's basic qualifications. Sunshine's still-proposed transmitter site is conceded to be less than one-half mile from a private airport runway, and the owner of the airport has filed suit against Sunshine to prevent Sunshine's construction of its tower. In the proceeding below, HBC moved to enlarge issues against Sunshine to determine if its proposed transmitter site is suitable; however, the ALJ denied the enlargement request by *Memorandum Opinion and Order*, FCC 90M-2254 (1990). Nonetheless, the Board would not grant a construction permit to an applicant, absent some determination that its proposed tower could be properly constructed adjacent to any airport (private or otherwise). Thus, if Sunshine could otherwise prevail herein, we believe that an appropriate "site suitability" issue would be required to be heard before we could grant Sunshine's application.

19. ACCORDINGLY, IT IS ORDERED, That the application of Sunshine Broadcasting, Inc. (File No. BPH-870625MI) IS DENIED, and the application of Hartsville Broadcasting Co., Inc., IS GRANTED, subject to the divestiture condition specified in the *Initial Decision*.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] The Board Chairman concurs in the grant of HBC's application. He is of the view, however, that because of the clear superiority of HBC's comparative proposal, it is unnecessary to also decide the question of Sunshine's financial qualifications. *See Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n. 2 (1991) (vacating Board Decision disqualifying losing comparative applicant on financial and other grounds); *CR Broadcasting*, 6 FCC Rcd 1384 n. 1 (1991) (declining to review as decisionally irrelevant losing comparative applicant's disqualification under city grade coverage issue); *accord, Colonial Communications, Inc.*, 6 FCC Rcd 2296 (1991) ("An agency, like a court, need not decide questions which are not relevant to its decision.") quoting *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-26

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to require that VHF ship station transmitters automatically cease operation after a predetermined period of operation	RM-6770

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 1991; Released: October 23, 1991

By the Commission:

I. INTRODUCTION

1. In the *Report and Order* (*R&O*) in this proceeding, 6 FCC Rcd 310 (1991), we amended Part 80 of the Rules, 47 C.F.R. Part 80, to require, among other things, that VHF ship station transceivers be equipped with an automatic timing device that deactivates the transmitter after an uninterrupted transmission period of five minutes. We specifically exempted portable, hand-held transceivers from this requirement. Bradford D. Carey (Carey) has filed a Petition for Partial Reconsideration (Petition) of that *R&O* asking the Commission to reconsider the exemption for hand-held transceivers. This Memorandum Opinion and Order addresses the Carey Petition.

II. DISCUSSION

2. In the *Notice of Proposed Rule Making* (*Notice*) in this proceeding the Commission proposed to require an automatic time-out timer as an integral part of all marine VHF transceivers to reduce incidents of "stuck carriers," *e.g.* a prolonged continuous signal radiated by the inadvertent operation of a marine VHF transmitter. Uniden America Corporation (Uniden), the Radio Technical Commission for Maritime Services (RTCM) and the Tandy Corporation (Tandy) filed comments to the *Notice* proposing that low powered portable marine VHF transceivers be excluded from the automatic time-out timer requirements. These commenters noted that because of the low power of portable hand-held marine VHF transmitters their transmissions are unlikely to cause interference. Further, they noted that such transmitters are battery operated and would quickly lose power if operated continuously for any length of time. Based on these comments, we adopted Rules that exclude marine VHF *hand-held*[1] transmitters from the automatic time-out timer requirement for marine VHF ship station transceivers.

3. Carey requests that the Commission reconsider the exemption for hand-held transceivers and require that such transceivers have an automatic time-out timer. Carey's argument is that some portable marine VHF transceivers can be operated using an external power supply and connected to the ship station antenna. Thus, he contends such transmitters are capable of causing interference because they are no longer battery operated and are connected to an antenna with greater range. Carey concludes that such transmitters should be required to have an automatic time-out timer.

4. As we noted in the *R&O*, the purpose of requiring an automatic time-out timer for ship station marine VHF transceivers is to help alleviate the problem of "stuck carriers" and thereby reduce the amount of interference on marine VHF channels. The Commission fully considered the interference potential of portable, hand-held transceivers in this regard and concluded that their low radiated power (low output power and inefficient antenna) and limited power supply (internal battery) kept them from contributing to the "stuck carrier" interference problem. Transceivers used as Carey describes, however, no longer meet the portable, hand-held criteria on which the exemption was based. Simply put, a marine VHF transmitter is exempt from the time-out timer requirement only when it is used as a portable, hand-held unit. Nothing in Carey's petition contradicts this conclusion and he provides no record of any problems caused by portable, hand-held transmitters. There is, however, merit in clarifying the Rules to prevent the situation described by Carey. We have made editorial changes to the Rules to make it clearer that the exemption for a portable, hand-held transceiver does not apply if the unit is used while connected to (1) an external power source or (2) a ship station antenna.

III. ORDERING CLAUSES

5. For the reasons set forth above, we conclude that the exemption of portable, hand-held transmitters from the requirement to have an automatic time-out timer should be affirmed as adopted in the *R&O* in this proceeding. Further, we are amending Section 80.203(c)(1) of the Commission's Rules, 47 C.F.R. § 80.203(c)(1), to clarify the Rule as discussed above.

6. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r) and Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), the Petition for Partial Reconsideration filed by Carey IS DENIED.

7. IT IS FURTHER ORDERED that pursuant to the authority contained in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331, Part 80 is amended, effective upon publication in the Federal Register, as set forth in the Appendix below.

8. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

[1] Emphasis added.

FEDERAL COMMUNICATIONS COMMISSION

* * * * *

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.141 is amended by adding a new paragraph (d) to read as follows:

§ 80.141 General provisions for ship stations.

* * * * *

(d) **Operating conditions.** Effective August 1, 1994, VHF hand-held, portable transmitters used while connected to an external power source or a ship antenna must be equipped with an automatic timing device that deactivates the transmitter and reverts the transmitter to the receive mode after an uninterrupted transmission period of five minutes, plus or minus 10 percent. Additionally, such transmitters must have a device that indicates when the automatic timer has deactivated the transmitter. See also Section 80.203(c).

3. In Section 80.203, paragraphs (c) and (c)(1) are revised to read as follows:

§ 80.203 Authorization of transmitters for licensing.

* * * * *

(c) All VHF ship station transmitters that are either manufactured in or imported into the United States, on or after August 1, 1993, or are initially installed on or after August 1, 1994, must be equipped with an automatic timing device that deactivates the transmitter and reverts the transmitter to the receive mode after an uninterrupted transmission period of five minutes, plus or minus 10 per cent. Additionally, such transmitters must have a device that indicates when the automatic timer has deactivated the transmitter. VHF ship station transmitters initially installed before August 1, 1994, are authorized for use indefinitely at the same maritime station.

(1) VHF hand-held, portable transmitters are not required to comply with the requirements in paragraph (c) above except when used as described in Section 80.141.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN AIRLINES, INC.,
Complainant,

v.

U S WEST COMMUNICATIONS,	File No. E-90-395
PACIFIC BELL,	File No. E-90-396
NEVADA BELL,	File No. E-90-397
THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-398
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-399
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-400
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-401
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-402
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-403
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-404
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-405
NEW YORK TELEPHONE COMPANY,	File No. E-90-406
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-407
WISCONSIN BELL, INC.,	File No. E-90-408
MICHIGAN BELL TELEPHONE COMPANY, and	File No. E-90-409
THE OHIO BELL TELEPHONE COMPANY,	File No. E-90-410

Defendants.

ORDER

Adopted: October 16, 1991; Released: October 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. This is a ruling on a motion filed by the American Airlines, Inc. (American) in the above-captioned proceedings to compel the defendant local exchange companies (LECs) to fully respond to certain unanswered or partially answered interrogatories filed by American on November 26, 1990. American's motion to compel, filed on January 10, 1991 (Motion), was directed to each of the named defendants. In its reply to the oppositions to the Motion, however, American stated that it was unnecessary to pursue the Motion except with respect to U S West.[1] For the reasons set forth below, we grant American's Motion with respect to U S West and order U S West to provide more complete responses to American's interrogatories and to make the documents referenced in its interrogatory responses available at its offices in Washington, D.C. for inspection and copying by American.[2]

2. As a threshold matter, U S West argues that American's complaint is contrary to Section 1.734(a) of the Commission's rules[3] because American failed to obtain the requisite permission from the Commission to file consolidated complaints against the 16 defendant LECs,[4] including U S West. U S West argues that American's consolidated Motion against the 16 defendants is equally impermissible.

3. U S West's contentions in this regard are unavailing. Section 1.734(a) provides that

> Complaints may generally be brought against only one named carrier; such actions may not be brought against multiple defendants unless the defendant carriers are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

American's complaints deal with both common issues of law and fact. A consolidated filing in this instance is consistent with Section 1.734(a) and requires no prior Commission action.

4. In its Motion, American argues that the information requested in its interrogatories regarding the particular service configurations at issue here is necessary in order to resolve the complaints. Therefore, American contends, U S West should be directed by the Commission to fully respond to the interrogatories. American further argues that if U S West intends to identify documents in lieu of a response, such documents should be made reasonably available to American for inspection and copying.

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[1] U S West filed its opposition to the Motion on January 24, 1991. American filed its reply on February 5, 1991 (Reply).

[2] In its Reply, American notes that, notwithstanding their oppositions to the motion to compel, all defendants but US West have provided or agreed to provide most of the information requested by American.

[3] 47 C.F.R. §1.734(a).

[4] *See* File Nos. E-90-395 through E-90-410.

5. U S West's contentions that the requested information is in certain instances irrelevant or is beyond the proper scope of discovery, or that the interrogatories are vague, are not persuasive. We find that the interrogatories are sufficiently tailored to elicit relevant information or are reasonably calculated to lead to the discovery of admissible evidence. Accordingly, U S West must provide complete answers within the time schedule set forth below. Should U S West identify documents in lieu of a response to a particular interrogatory, such documents must be provided to American within the established schedule.[5]

6. U S West further argues that it is not providing the documents referenced in its interrogatory responses because American has failed to file a motion for the production of documents under Section 1.730(a) of the Commission's rules.[6] U S West argues that, in any event, it has told American where it may obtain some of the requested documents and that the burden is on American to go to the source and obtain such documents. In addition, U S West objects to the production of what it describes as proprietary AT&T documents without the issuance of a Protective Order by the Commission.[7]

7. American states in it Reply that its interrogatories requested from each of the defendants technical detail regarding Feature Group A, Feature Group D and Remote Call Forwarding services. American argues that U S West opposed the request and instead of providing full and complete answers to the interrogatories, referred American to numerous written materials that U S West claims are either in the public file or otherwise available.[8] American argues that because U S West failed to respond fully in written detail to its interrogatories and instead referenced documents, an obligation has been created to make those documents available to American. We agree.

8. We emphasize that our interest at this point in the proceeding is to ensure that the parties proceed with the important task of building a full record upon which a decision in this case can be made.[9] We believe that requiring U S West to make the documents referenced in its interrogatory responses available for inspection and copying by American at U S West's offices in Washington, D.C. will pose no unreasonable burden on U S West while providing American reasonable access to potentially relevant documents. Additionally, we require that U S West ascertain whether the AT&T documents are still considered proprietary by AT&T, and, if not, make them available under the schedule set forth below. To the extent that documents continue to be subject to proprietary claims, we urge the parties to work together to achieve a confidentiality agreement that will facilitate the prompt exchange of any documents properly subject to such protection.[10]

9. For the foregoing reasons, we will require U S West to provide complete responses to American's interrogatories and to make the documents referenced in its interrogatory responses available at its offices in Washington, D.C. for inspection and copying by American no later than ten (10) business days from the date of release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, that American's Motion to Compel IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

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[5] We note that U S West generally objects that it is being asked to create documents that are not already in existence. It does not appear that American has asked for the creation of presently non-existent documents. In any event, such documents are not contemplated by this Order unless U S West elects to provide such documents in lieu of a written interrogatory response.

[6] 47 C.F.R. §1.730(a).

[7] At a status conference held on October 9, 1991, counsel for U S West stated that it had not yet been able to ascertain whether the "proprietary" AT&T documents were still considered to be proprietary by AT&T.

[8] In its Motion, American requested that any documents referenced in response to its interrogatories be made reasonably available for inspection and copying in Washington, D.C.

[9] At the October 9, 1991, status conference, the staff orally advised counsel for the parties that all discovery should be concluded within thirty (30) days from the date of release of this Order.

[10] With respect to any documents that are or could be filed with the Commission, the parties should be guided by Sections 0.441 *et seq.* of the Commission's rules, 47 C.F.R. §0.441 *et seq.*, in negotiating protective or confidentiality agreements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's Rules to allow certain ship earth station equipment to be used in the INMARSAT space segment.	RM-7512

ORDER

Adopted: October 2, 1991; Released: October 23, 1991

By the Commission:

1. The Commission's Maritime Services Rules provide that manufacturers of ship earth station equipment intended for use with the INMARSAT (International Maritime Satellite Organization) system of communications satellites, *e.g.* the INMARSAT space segment, must comply with the Commission's verification procedure.[1] At present, however, manufacturers are limited to the production of INMARSAT Standard-A ship earth stations because Section 80.203(f) of the Commission's Rules, 47 C.F.R. § 80.203(f), specifies that all ship earth station equipment must be verified in accordance with the INMARSAT document titled "Type Approval Procedures for an INMARSAT Standard-A Ship Earth Station Model" (INMARSAT-A).

2. On September 7, 1990, Koden International, Inc. (Koden) filed a petition to amend Section 80.203(f) of the Commission's Rules to allow the INMARSAT-C ship earth station equipment (INMARSAT-C) to be used in the INMARSAT space segment.[2] Koden states that the INMARSAT-C uses the same frequency spectrum and satellites as the INMARSAT-A and is type-approved by INMARSAT. Koden, therefore, requested that the Commission accept the INMARSAT type-approval for the INMARSAT-C as evidence of compliance and add the INMARSAT-C to Section 80.203(f). The Private Radio Bureau, seeking comment from the public, put this matter on Public Notice on October 12, 1990, Report No. 1827, RM No. 7512. The Communications Satellite Corporation (COMSAT), the U.S. Signatory to INMARSAT, filed timely comments in support of this Petition and, in addition, requested that Section 80.203(f) be expanded to permit the use of certain future models of ship earth station equipment proposing to use the INMARSAT space segment.[3]

3. In 1983, we adopted rule changes to conform the Commission's Maritime Services Rules with the International Maritime Satellite requirements. Among other things, we decided that "ship earth station equipment must comply with the technical standards contained in the INMARSAT document that is entitled Type Approval Procedures for an INMARSAT Standard-A Ship Earth Station Model."[4] The rule change also permitted manufacturers of ship earth station transmitters to use the Commission's equipment verification procedure to show compliance with such requirements. In arriving at this decision to permit manufacturers to use the verification process we considered the type approval process required by INMARSAT and determined that "[c]ompliance with the INMARSAT type approval requirements. .. will be left to the discretion of each manufacturer."[5] At the time these rules were changed the only INMARSAT Type Approval procedure was for the INMARSAT-A. Since that time, INMARSAT has developed a type approval document for the INMARSAT-C ship earth station and has authorized use of such equipment in its space segment.[6] The present rules, however, do not permit the use of the INMARSAT-C or use of other ship earth station equipment being developed such as the INMARSAT-B or INMARSAT-M equipment.[7]

4. We conclude that it is in the public interest to expand the scope of Section 80.203(f) of the Commission's Rules to permit the use of the INMARSAT-C as well as future ship earth station equipment that meets the type approval process promulgated by INMARSAT. COMSAT, the U.S. signatory to INMARSAT, fully supports this rule change.[8] Such a change in the rules will promote the public interest by expanding the types of maritime satellite equipment readily available to the maritime community. Further, we find, as we did for the INMARSAT-A in 1983, that INMARSAT's type approval of equipment is sufficiently stringent to ensure that such equipment meets INMARSAT's technical and operational requirements. Therefore, we will permit manufacturers of such equipment to use the Commission's verification procedure. Manufacturers of such equipment must meet the technical criteria promulgated by INMARSAT just as the Commission required in the 1983 *Report and Order* permitting INMARSAT-A equipment to be verified.[9]

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[1] Verification, described in Section 2.902 of the Commission's Rules, 47 C.F.R. § 2.902, is an equipment authorization procedure wherein an equipment manufacturer verifies to the Commission that it has tested the subject equipment and has taken the necessary steps to ensure that the equipment complies with the appropriate technical standards.

[2] The INMARSAT-A provides voice, telex, and data communication capability. The INMARSAT-C is much smaller and provides store and forward data and text message service capability.

[3] INMARSAT is an international organization that provides worldwide maritime telecommunications services by means of satellite.

[4] Report and Order, Gen. Docket No. 82-36, 48 Fed. Reg. 8460 (1983).

[5] *Id.* at para. 19.

[6] The INMARSAT "type approval" procedure is not related to the Commission's equipment authorization processes. INMARSAT requires all earth stations to meet its type approval process prior to commissioning such equipment for use with the INMARSAT space segment.

[7] The INMARSAT-B is a digital system that will provide data, facsimile, high quality telephone and telex services. The INMARSAT-M is a digital system that willprovide medium quality telephone and low speed data and facsimile services between fixed land-users and maritime mobile users.

[8] COMSAT comments at 3.

[9] Additional requirements may be required as a result of the *Notice of Proposed Rule Making* incorporating the Global Maritime Distress and Safety System, 5 FCC Rcd 6212 (1990).

5. This amendment is non-controversial and constitutes a change to the rules in which the public is not likely to be interested. Therefore, we find for good cause that compliance with the notice and comment procedure of the Administrative Procedures Act is unnecessary. *See* 5 U.S.C. § 553(b)(B). In addition, because this rule change promotes safety and efficiency in the maritime service by removing an unnecessary restriction imposed by the rules, which limits the equipment available for use in the INMARSAT space segment to the INMARSAT-A, we find good cause to authorize manufacturers of ship earth station equipment type approved by INMARSAT to use the Commission's verification procedure immediately. This includes the INMARSAT-C ship earth station as well as future ship earth station equipment type approved by INMARSAT. Therefore, this rule amendment will be effective immediately upon publication in the Federal Register. *See* 5 U.S.C. § 553(d)(1).

6. Accordingly, IT IS ORDERED THAT Section 80.203(f) of the Commission's Rules, 47 C.F.R. § 80.203(f), IS AMENDED as set forth in the appendix below. Authority for this action is found Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

7. FCC Contact: Susan Jones or George Dillon, Aviation and Marine Branch, Special Services Division, Private Radio Bureau, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.203(g) is amended by revising the second sentence to read as follows:

§ 80.203 Authorization of transmitters for licensing.

* * * * *

(g)* * *Such equipment must be verified in accordance with the technical requirements provided by INMARSAT and must be type approved by INMARSAT for use in INMARSAT space segment.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-293

In the Matter of

Amendment of Part 80 of the Commission's Rules to permit the use of facsimile and data emissions on marine public correspondence channels in the 156-162 MHz band.

NOTICE OF PROPOSED RULE MAKING

Adopted: October 2, 1991; Released: October 23, 1991

Comment Date: December 16, 1991
Reply Comment Date: January 2, 1992

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to permit the use of facsimile and data communications nationwide on all marine 156-162 MHz band (marine VHF) public correspondence channels for communications between public coast stations and ship stations. The *Notice* responds to a request by WJG Maritel Corporation (WJG) to permit such use.[1]

II. BACKGROUND

2. Public coast stations provide for the business, operational and personal communications needs of ship personnel. Initially, because of the large size of the shipboard radio equipment and the specialized training required to send and receive manual Morse code, these communication services were available only to large ships. Advances in radio communication technology, however, have changed the service from one based on manual Morse code to a more economical and convenient integrated system that uses voice and data communications. This has made it easier for more ships to equip with radio equipment and has resulted in public coast stations offering a wide range of communications services to all ships irrespective of size.

3. The Commission has from time to time amended Part 80 of its Rules governing the Maritime Services, 47 C.F.R. Part 80, to permit the use of new technologies to provide new communications services. The Rules were changed in 1983, for example, to provide for facsimile communications between public coast stations and vessels operating on frequencies in the 3-30 MHz band.[2] Three years later, the Commission adopted rules to permit an integrated system of public coast stations operating on marine VHF public correspondence channels in the Great Lakes region to provide facsimile and data communication services to ship stations.[3] In addition, when the Commission allocated frequencies in the 216-220 MHz band for an Automated Maritime Telecommunications System (AMTS)[4] in 1981, it permitted facsimile and data communications.[5] Other than on the Great Lakes, however, facsimile and data communications are not available to the hundreds of thousands of boats and ships using marine VHF radios along the inland waterways and coasts of the United States.

III. DISCUSSION

4. WJG argues that facsimile communications can be sent over public coast VHF facilities without prejudice to service to other customers or radio frequency users.[6] According to WJG, it has successfully completed its facsimile developmental tests without causing any interference.[7] WJG contends that there is considerable interest in facsimile communications on VHF public correspondence channels and claims that maritime operators would seek facsimile service if it were available throughout the Nation's waterways.[8]

5. The demand for facsimile and data transmission capability in the maritime community appears to be growing. In the past we have attempted to accommodate evolving maritime marketplace demands whenever they were not in conflict with the international Radio Regulations and would not increase interference potential. The international Radio Regulations do not prohibit facsimile and data communications on public correspondence channels.[9] In addition, public correspondence frequencies available for coast stations are authorized on an exclusive basis. That is, they are afforded protection from co-channel interference.[10] Therefore, allowing facsimile and data frequencies nationwide should not present an interference problem provided the transmissions conform to existing technical requirements regarding, *e.g.*, bandwidth and

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[1] The Commission authorized WJG Maritel Corporation (WJG) by special temporary authority (STA) to offer facsimile and data services over certain of its maritime facilities on a developmental basis. In its Second Developmental Report dated May 16, 1990, WJG requested that the Commission amend its Rules to permit facsimile and data communications to be transmitted over VHF public coast station facilities.

[2] Report and Order, Docket 83-90, 48 Fed. Reg. 45560 (1983).

[3] Report and Order, Docket No. 85-145, 52 Fed. Reg. 31206 (1986).

[4] The Automated Maritime Telecommunications System (AMTS) is a maritime system using the frequencies in the 216.880-217.080 MHz band to provide communication services to ship and offshore fixed platform stations in U.S. waterways in the continental United States. See Sections 80.5, 80.385, 80.1169 and 80.1171 of the Commission's Rules, 47 C.F.R. §§ 80.5, 80.385, 80.1169 and 80.1171.

[5] Report and Order, Gen. Docket 80-1, 46 Fed. Reg. 15690 (1981).

[6] Second Developmental Report at 1 and 2.

[7] *Id.* at 3.

[8] *Id.* at 5.

[9] *See* Appendix 18, International Radio Regulations, footnotes d and e.

[10] *See* Section 80.773 of the Commisssion's Rules, 47 C.F.R. § 80.773.

spurious emissions.[11] Further, allowing non-voice transmissions, such as facsimile and data, introduces the potential for increased channel efficiency in the marine VHF band. Finally, permitting the use of facsimile and data communications on all marine VHF public correspndence frequencies nationwide would expand the range of communications services permitted to be offered to the maritime community by VHF public coast stations.

6. For these reasons, we propose to amend Part 80 of the Rules as set forth in the Appendix. These rules, if adopted, would permit the use of facsimile and data communications, in conjunction with voice operation on the 156-162 MHz public correspondence frequencies. Such use would be subject to the same bandwidth and emission requirements as voice operations. It is further proposed that the use of such additional communication modes be permitted by any ship and coast station under its existing license provided mutual arrangements have been made between ship and coast station licensees.

7. Although this *Notice* is primarily concerned with the expansion of facsimile and data on public correspondence channels, in many circumstances it may be more efficient to employ other forms of communications. Therefore, we specifically request comments on whether we should provide for other emission types that would not adversely affect normal maritime communications.

IV. PROCEDURAL MATTERS

Ex Parte Rules-Non-Restricted Proceeding

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

9. We certify that the Regulatory Flexibility Act of 1980, does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Although these proposed changes allow the maritime community greater flexibility in the provision of additional forms of communications, *e.g.*, facsimile and data, and may result in increased expenditures for equipment, such additional expenditures would be optional and would not constitute a significant economic impact on a substantial number of small business entities. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Comment Dates

10. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **December 16, 1991** and reply comments on or before **January 2, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N. W. Washington, D.C. 20554.

FCC Contact

11. For further information concerning this docket contact Mr. George Dillon of the Private Radio Bureau at (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.122 is amended by revising paragraph (b)(1) to read as follows:

§ 80.122 Public coast stations using facsimile.

* * * * *

(b) **Assignment and use of frequencies.** (1) Frequencies in the 2000-27500 kHz bands listed in Part 2 of the Commission's rules as available for shared use by the maritime mobile service and other radio services are assignable to public coast stations for providing facsimile

[11] This conclusion is supported by our experience with allowing public coast stations to offer data and facsimile services on marine VHF public correspondence channels in the Great Lakes.

communications with ship stations. Additionally, frequencies in the 156-162 MHz band available for assignment to public coast stations for radiotelephone communications that are contained in subpart H of this part are also available for facsimile communications.

* * * * *

3. Section 80.207 is amended by revising Footnote 2 to paragraph (d) to read as follows:

§ 80.207 Classes of emission.

* * * * *

[2] Frequencies used for public correspondence and in the automated multi-station system (AMSS). See §§ 80.371(c) and 80.385(c).

* * * * *

4. Section 80.213 is amended by revising paragraph (d) to read as follows:

§ 80.213 Modulation requirements.

* * * * *

(d) Ship and coast station transmitters using F1B, F2B, F2C, F3C, G3D, or G3E emission in the 156-162 MHz and 216-220 MHz bands must be capable of proper operation with a frequency deviation of ±5 kHz.

* * * * *

5. Section 80.361 is amended by revising its title and adding a new paragraph (d) to read as follows:

§ 80.361 Frequencies for radioprinter and data transmissions.

* * * * *

(d) The frequencies in the 156-162 MHz band available for assignment to public coast stations that are contained in § 80.371(c) of this part are also available for radioprinter and data communications between ship and coast stations using F1B or F2B emission.

7. Section 80.363 is amended by designating the introductory paragraph as paragraph (a), redesignating paragraphs (a) and (b) as (a)(1) and (a)(2) respectively, and adding a new paragraph (b) to read as follows:

§ 80.363 Frequencies for facsimile.

* * * * *

(b) The frequencies in the 156-162 MHz band available for assignment to public coast stations that are contained in § 80.371(c) of this part are also available for facsimile communications between ship and coast stations using F2C or F3C emission.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-294

In the Matter of

Amendment of Part 80 of the
Commission's Rules concerning the
use of synthesized voice for
distress communications on
VHF marine channel 16.

NOTICE OF PROPOSED RULE MAKING

Adopted: October 2, 1991; Released: October 24, 1991

Comment Date: December 16, 1991
Reply Comment Date: January 2, 1992

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making (Notice) proposes to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to permit the use of synthesized voice for distress transmissions on VHF marine channel 16.

II. DISCUSSION

2. On September 28, 1990, Mr. Robert Tendler filed a Request for an Issuance of Declaratory Ruling, asking the Commission to interpret Part 80 of the Commission's Rules to permit the use of automated synthesized voice on VHF marine channel 16[1] during distress transmissions, and in doing so, to authorize the manufacture and marketing of the Emergency Vessel Location System designed by Mr. Tendler.[2] We put this matter on Public Notice on October 24, 1990, 55 Fed. Reg. 45,625 (1990). The Radio Technical Commission for Maritime Services (RTCM) responded to the public notice with timely comments.[3] The RTCM objected to the issuance of a declaratory ruling on the grounds that such an "interpretation" of the Commission's Rules could result in significant changes in the radio operating procedures related to maritime distress and safety communications without providing an opportunity for review of the proposal and consideration of its impact and potential implications by those affected in the maritime community.[4] RTCM states that any change in the rules that has the potential of affecting safety of life at sea should be adopted only after adequate opportunity for public review and comment in the procedural form of a Notice of Inquiry or Notice of Proposed Rule Making.[5]

3. Mr. Tendler filed timely reply comments opposing RTCM's position that a full rule making process was necessary on the basis that his proposed system would not significantly alter radio operating procedures related to marine distress and safety communications because it would operate on marine VHF channel 16, that is allocated for distress calls.[6] In addition, Mr. Tendler argued that because the Commission previously addressed the use of synthesized voice for emergency location devices, the use of synthesized voice on his proposed system should not be considered as a "significant change in radio operating procedures."[7] Finally, Mr. Tendler objected to any further proceeding in this matter, claiming that the public interest would best be served by the issuance of a declaratory ruling so that his proposal, as a safety device, would be made available to the public as soon as possible.[8]

4. The Commission agrees with RTCM that the use of synthesized voice for distress communications on VHF marine channel 16 merits a careful review and examination of the issues raised during a full rule making procedure. We take this position in the interest of preserving a primary purpose of Part 80 of the Commission's Rules – to provide for the safety of life and property at sea. Because safety is of such paramount concern, we have tried to ensure that radio transmitters licensed under Part 80 operate effectively for the maritime community and national and international search and rescue teams. We have found caution to be especially important when dealing with new systems.[9] For these reasons, this Notice will

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[1] The United States Coast Guard (USCG) maintains an aural watch on channel 16 and responds to distress calls made on this channel. Ships equipped with VHF stations in compliance with the Communications Act of 1934, as amended, 47 U.S.C. Title III, the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, or the Agreement Between the United States of America and Canada for the Promotion of Safety on the Great Lakes by Means of Radio, T.I.A.S. 7837, amended T.I.A.S. 9352, are required to maintain a watch on channel 16 when the station is not being used for other traffic. Additionally, ship stations voluntarily equipped with a VHF station are required to maintain a watch on channel 16 when the station is operating and not being used for other traffic.

[2] Mr. Tendler's proposed device is designed to determine the latitude and longitude position from a Loran C, satellite global positioning system or any other electronic device providing ship position information, and to combine this information with other predetermined information, such as the ship's description and call sign, to form a synthesized voice distress message. The distress message would begin with the international radiotelephone distress signal, "MAYDAY," and would be transmitted on marine VHF channel 16, the international distress and calling channel. As proposed by Mr. Tendler, the distress message would be broadcast with two automatic repetitions, twenty seconds in duration, with a ninety second interval between each repetition, after which the system would automatically shut off until manually reactivated.

[3] Comments, filed by RTCM. The RTCM is a nonprofit organization that studies maritime issues. It is comprised of marine electronics manufacturers, government organizations, such as the U.S. Coast Guard, as well as other parties interested in maritime operations.

[4] Comments by RTCM, at 2.

[5] *Id.* at 2.

[6] Reply Comments, filed by Robert Tendler, page 5.

[7] *Id.* at 6.

[8] *Id.* at 9.

[9] Although Mr. Tendler's proposed system performs the same function as an ELT or EPIRB, *e.g.*, it transmits a distress signal, there are significant differences between his system and the

deny Mr. Tendler's Request for an Issuance of Declaratory Ruling, yet initiate a rule making proceeding to examine Mr. Tendler's proposal under the scrutiny afforded by a notice and comment proceeding.

5. The purpose of this Notice is to obtain a full public record on the issue of allowing synthesized voice distress transmissions on VHF marine channel 16. It is our belief that allowing such transmissions could enhance maritime safety. The U.S. Coast Guard also believes such a proposal could have benefits for mariners in distress.[10] Accordingly, we propose to amend the rules to permit the optional use of synthesized voice on VHF marine channel 16. We propose to permit the use of external add-on devices to generate the synthesized voice message. Additionally, we have specified that the use of synthesized voice can not exceed the existing technical standards such as emission and bandwidth limitations for ship VHF transmitters, and we have proposed to limit the number of repetitions, length and content of a synthesized voice message. We request specific comments on the merits of this proposal. Further, we invite comments on whether synthesized voice should be permitted on other marine channels.

III. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

6. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.206(a).

Regulatory Flexibility Act

7. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. VHF marine radio manufacturers and radio operators will not be significantly affected by this rule making because the proposed use of synthesized voice will be optional. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Notice and Comment

8. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **December 16, 1991,** and reply comments on or before **January 2, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED THAT the Request for Declaratory Ruling filed by Mr. Robert Tendler to interpret Part 80 of the Commission's Rules, 47 C.F.R. Part 80, as permitting the use of synthesized voice during distress transmissions, IS DENIED.

FCC Contact: William Berges, Private Radio Bureau, Aviation and Marine Branch, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.203 is amended by revising paragraph (m) to read as follows:

§ 80.203 Authorization of transmitters for licensing.

* * * * *

(m) Ship station VHF transmitters may employ external or internal devices to send synthesized voice transmissions for distress and safety purposes on the frequency 156.800 MHz provided they meet the following requirements:

(1) The technical characteristics of the distress transmissions must comply with this part;

(2) A VHF transmitter and any internal device capable of transmitting a synthesized voice message must be type accepted as an integral unit;

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manner in which ELTs and EPIRBs operate. For example, ELTs and EPIRBs are separate and distinct transmitters used solely as emergency beacons. A marine VHF two-way radio is an integral part of Mr. Tendler's system which is used for both emergency and routine communications.

[10] *See* letter, in Docket File, from D.R. Freezer, Captain, U.S. Coast Guard, Chief, Search and Rescue Division addressed to Mr. Gene A. Bechtel, attorney for Mr. Tendler (August 3, 1990).

(3) The synthesized voice distress transmission must begin with the words "this is a recording" and may be comprised of;

(i) the radiotelephone distress call as described in § 80.315(b) and the ship's position as described in § 80.316(c); or

(ii) the radiotelephone distress message as described in § 80.316(b). If available, the ship's position should be reported as described in Section 80.316(c);

(4) Such transmission must be initiated manually by an on-off switch and cause the VHF transmitter to switch to channel 16. The radiotelephone distress call and message described in §§ 80.203(l)(3)(i) and (ii), respectively, may be repeated. However, the entire transmission including repeats must not exceed 30 seconds from beginning to end and upon ending must return the VHF transceiver to the receive mode for at least thirty seconds. Placing the switch to the off position must stop the distress transmission and permit the VHF transmitter to be used to send and receive standard voice communications. The switch must be designed to prevent inadvertent activations; and

(5) Use of the microphone must cause the synthesized voice distress transmission to cease and allow the immediate use of the VHF transmitter for sending and receiving standard voice communications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-108

In re Applications of

SUMTER RADIO PARTNERS — File No. BPH-880310NM

IRIS COMMUNICATIONS, INC. — File No. BPH-880310NS

For Construction Permit
for a New FM Station
on Channel 234A, in
Sumter, South Carolina

Appearances

John H. Midlen, Jr., Esq. and *Gregory H. Guillot, Esq.* on behalf of Sumter Radio Partners; *Gary S. Smithwick, Esq., Arthur V. Belendiuk, Esq.*, and *Lisa Thornton, Esq.* on behalf of Iris Communications, Inc; and *Charles E. Dziedzic, Esq.* and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: October 18, 1991; Released: October 25, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of two surviving applicants:[1] Sumter Radio Partners ("SRP") and Iris Communications, Inc. ("Iris"). These two applicants are competing for the award of a permit to construct a new FM Station on Channel 234A at Sumter, South Carolina.

2. The *Hearing Designation Order* ("*HDO*") DA 90-306, released March 19, 1990, reported at 5 F.C.C. Rcd 1713 (MM Bur. 1990) and published at 55 Fed. Reg. 12420 (released April 3, 1990) sets the air hazard and standard comparative issues for adjudication as follows:

> (a) To determine whether there is a reasonable possibility that the tower heights and locations proposed by [Sumter Radio] Partners . . . would constitute a hazard to air navigation.
>
> (b) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (c) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The party applicants have the burdens of proving their proposals by a preponderance of the evidence. *Cuban-American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990). *See also Steadman* v. *SEC*, 450 U.S. 91 (1981).

3. SRP demonstrated in its Motion For Summary Decision filed on August 23, 1990, that no genuine issue of material fact remains for resolution under the designated air hazard issue. Therefore, the issue was resolved in favor of the applicant. *Order*, FCC 90M-2969, released September 19, 1990.

4. A prehearing conference was held on June 1, 1990. The trial was conducted before the undersigned Presiding Judge on September 19, 1990. The record was closed on September 19, 1990. The parties were directed to file Proposed Findings Of Fact And Conclusions Of Law ("PFC") by November 6, 1990, and to file Reply Proposed Findings Of Fact And Conclusions Of Law ("RPFC") by December 5, 1990. *Order*, FCC 90M-3009, released September 24, 1990. The Mass Media Bureau (the "Bureau") filed its PFC on November 6, 1990, which is limited to the comparative coverage aspect of the standard comparative issue. *See HDO* at Para. 10. This decision on the comparative merits of all remaining applications is issued after a Commission affirmance of the Presiding Judge's post hearing dismissal of a former applicant.[2]

5. References to exhibits are made to the numbered exhibits of each applicant that were admitted into evidence. References to proposed findings and conclusions are introduced by "PFC" and references to reply findings and conclusions are introduced by "RPFC."

FINDINGS OF FACT

6. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues remaining for trial wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F.C.C.*, 325 U.S. 327, 333 (1945); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties have right to present oral and documentary evidence and to conduct cross-examination).

Standard Comparative Issue

7. The matters for determination under the standard comparative issue are whether the applicants' coverage proposals reflect any significant difference in the size of the areas and populations which would receive service from the proposals [*HDO* at Para. 6]; which of the integration proposals would, on a comparative basis, best serve the public interest [*HDO* at Para. 8(2)]; and, in light of the evidence adduced relating to those issues, which of the applications should be granted [*HDO* at Para. 8(3)]. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

Comparative Coverage

8. The parties were required to submit evidence on comparative coverage for consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural services of Grade B or greater intensity. The findings are based on the Joint Engineering Exhibit ("Jt. Eng. Exh.") that was offered and received in evidence on the first day of trial. (Tr. 33-34.)

9. The following are the areas and populations which the two applicants will cover within their respective 1.0 mV/m contours:

Applicant	Population	Area sq.km)
Iris	90,665	1,800
SRP	86,235	1,803

(Jt. Eng. Exh. at 13.)

Other Available Services

10. During daytime hours, all of the applicants provide coverage to populations that already receive five or more aural services. (Jt. Eng. Exh. 1 at 4.) During nighttime hours, Iris and SRP provide coverage to areas that are underserved (served by fewer than five aural services). (Jt. Eng. Exh. 1 at 4.) None of the applicants proposes to serve white areas (areas that presently receive no service) or grey areas (areas that presently receive only one service).

11. The following Bureau analysis demonstrates the extent to which each applicant will provide a new service to the underserved areas during nighttime hours.

Applicant	Fourth New Service (Pop/Area)		Fifth New Service (Pop/Area)	
SRP	880	90	3,925	298
Iris	270	25	1,460	61

Media Diversification

SRP

12. SRP's equity ownership is as follows: Kevin D. Ireland ("Ireland"), a general partner, owns 20%. Charles A. Barton ("Barton") and John H. Midlen, Jr. ("Midlen"), also general partners, own 40% each. (SRP Exh. 1.) Mr. Midlen also represents SRP as its communications counsel in these proceedings.

13. SRP proposes to co-locate its station at Station WSSC in Sumter. Station WSSC is owned by Mid-Carolina Communications, Inc. ("M-CC"). M-CC is 100% owned by Barton and Midlen. Ireland is general manager of Station WSSC. (SRP Exh. 3.)

14. Additionally, Barton is a Vice President of Price Broadcasting Company, the licensee of the following Stations: WEZL-FM, Charleston, South Carolina; WOMG and WOMG-FM, Columbia, South Carolina; KEMX and KCPX, Salt Lake City, Utah; KGA and KDRK-FM, Spokane, Washington; KOOK and KRBE-FM, Modesto, California; KQMS and KSHA-FM, Redding, California; KROW and KNEV-FM, Reno, Nevada; and KHEZ-FM, Boise, Idaho. Barton also is President and a Director of Fox Valley Broadcasting, Inc, licensee of Station WQBZ-FM, Fort Valley, Georgia, and an owner of 45.79% of Fox Valley's equity. (SRP Exh. 3.)

Iris

15. Iris' President, Ralph W. Canty ("Canty"), a person proposed for integration into management, is one of thirty-six members of the Board of Trustees of Morris College, Sumter, South Carolina. He has been a trustee since 1983. Morris College is owned by the South Carolina Baptist Educational and Missionary Convention. Canty is not an officer or a member of the Executive Board or of any other board of the Convention. (Iris Exh. 6.) His term expires in May 1992 and he cannot be reappointed. (Iris Exh. 6.)

16. In 1989, Morris College acquired, by gift, Standard Broadcast Station WQMC, Sumter, South Carolina. WQMC operates on 1290 kHz with 1,000 watts. Canty was not at the meeting of the Trustees when the gift was announced and he has not attended any meetings of the Trustees since the station was acquired. Canty testified that he has not participated in any decisions involving WQMC. Canty does present daily a sixty minute program over WQMC. But he has no control over any other programming or over any of the policies at WQMC. (Iris Exh. 6.)

Best Practicable Service

Sumter Radio Partners

Integration Proposal

17. SRP is a general partnership organized as such under the Laws of South Carolina. (SRP Exh. 1.) Ireland, its 20% shareholder, is proposed for integration as full time general manager. (SRP Exh. 4.) Barton and Midlen, limited partners and owners of 80% of SRP's equity, are not proposed for integration. But it is found as a fact that Mr. Midlen has served as counsel and has performed substantial legal services for SRP in furtherance of its application for the new Sumter broadcast allocation.

18. Ireland is proposed to become general manager of the new station and to be so employed forty or more hours each week. (SRP Exh. 4.) Mr. Ireland's responsibilities would include overall management duties, budgeting, staffing, and supervision of news, programming, sales, office and engineering operations. He also would promote community civic work and assume charge of the station's construction. He would handle certain sales functions and certain advertising agency accounts which will only deal directly with the general manager. (SRP Exh. 4.) However, he also will continue his employment as general manager of Station WSSC in Sumter.

19. To accommodate his dual employment, Ireland proposes to reduce his duties at WSSC to "approximately ten hour per week and not to exceed twenty hour per week." (SRP Exh. 4.) SRP represents that Ireland's current local sales efforts relating to WSSC will be taken over by an expanded AM-FM sales force. (SRP Exh. 4.) But there is no evidence to show how WSSC could operate with only 10 to 20 hours per week of Ireland's time. There is no evidence of additional qualified personnel being hired to supplement Ireland, even on a part-time basis. In keeping his position as general manager at WSSC, it is found that Ireland would be required to work a minimum of 50 hours per week and perhaps as much as 70-80 hours per week for an indefinite period of time, and with no relief in sight.

Broadcast Employment

20. In March 1986, Ireland was first employed at Station WSSC as sales manager. In August 1986, he was promoted to general manager and he has held that position to the present. (SRP Exh. 2.)

Local Residence

21. Ireland has resided within the Sumter city limits and within the 70 dbu contour of the proposed station since 1972. (SRP Exh. 2.)

Civic Activities

22. From 1977 through 1982, Ireland was a member of the Sumter Junior Chamber of Commerce. From 1982 until the present, he served as a SKIB (Sumter Kids In Baseball) baseball coach in Sumter. From 1976 to 1989 he was a charter member of the Concord Baptist Church, Sumter. From 1984 to 1986, he was a deacon at the Concord Baptist Church. From 1989 until the present, he has served as a member of the publicity committee of Wise Drive Baptist Church, Sumter. (SRP Exh. 2.)

Auxiliary Power

23. SRP will install auxiliary power generators at its transmitter and studio sites. (SRP Exh. 5.)

Iris Communications, Inc.

Integration

24. Leroy Durant ("Durant"), an Afro-American, will serve as full-time general manager of the proposed station. He will work a minimum of 40 hours per week in that capacity. As general manager, Durant will oversee construction of the station and, thereafter, he will oversee all aspects of the station operation. All department heads will report to him. Durant will terminate any other employment or business interests he may have prior to the commencement of program tests by Iris' station. (Iris Exh. 2.)

25. Mr. Canty, an Afro-American, will serve as full-time station manager/operations director. He will work in that capacity a minimum of 40 hours per week which is full-time. Canty will be responsible for the program and engineering departments. He also will have supervisory authority over the program director and the scheduling of announcers. He will assume all responsibilities of the general manager when Durant is absent from the station. (Iris Exh. 3.)

26. Emma J. Singleton ("Singleton"), an Afro-American, will serve as full-time sales manager. She will supervise the sales department. In that position, she will coordinate the activities of sales persons and develop a strategy for the station's sales efforts. She has committed to terminate her employment. (Iris Exh. 4.)

27. James Stover ("Stover"), an Afro-American, will serve as the station's full-time business manager. He will supervise the office and the administrative employees and he will oversee the station's EEO efforts. Also, he will have management responsibility over the station's employee benefit policies. He is committed to terminate his employment. (Iris Exh. 5.)

Broadcast Experience

28. Durant has past broadcast experience at WBTW(TV), Florence, South Carolina, where he was employed from 1970 until 1972 as production director/switcher, and at WWDM-FM, Sumter, South Carolina, where he was employed from 1972 until 1984 as station manager. (Iris Exh. 2.) Canty, Singleton and Stover have no broadcast experience.

Local Residence

29. Durant has committed to move his residence to Sumter if Iris receives the grant. He will effect his move prior to the commencement of program tests. (Iris Exh. 2.)

30. Canty has resided within Sumter and its service contour since 1945. (Iris Exh. 3.) Singleton also has resided within Sumter and its primary service contour since 1945. (Iris Exh. 4.) And since 1955, Stover has resided within Sumter's primary service contour. (Iris Exh. 5.) The number of years for which Iris receives credit for local residence within the city of license total 128.

Civic Activities

31. The civic activities claimed for the four integrated principals of Iris are extensive. (*See* Iris PFC at 10-15.)[3] These are summarized as follows.

32. Durant was a Sumter Jaycee, a member of Sumter's Chamber of Commerce, and a member of the Sumter Merchant's Association. These activities occurred during the period 1976 to 1981. Durant also served on a broadcast advisory board at Morris College during 1983-84, an institution of higher learning located in Sumter. (Iris Exh. 2.)

33. From 1972 to date, Canty has been serving on boards of several organizations affiliated with the Baptist Church. He has been a trustee of Morris College since 1983. Since 1988, he has been a member of the business and professional executives committee of Sumter's Chamber of Commerce. (Iris Exh. 3.)

34. From 1986 through mid-1990, Singleton was a member of the board of directors of Sumter's Chamber of Commerce. As a vice-president for public affairs, she headed specific civic activities: "Crime Stoppers," the "Rub O' The Green" (golf tournament) and "Leadership Sumter." Since 1988, she has served on the Sumter Downtown Design Review Committee. From 1982 to the present, she has been a member of the Sumter Music Guild. Since 1989, Ms. Singleton has been a member of the Iris Festival Board of Commission. (Iris Exh. 4.)

35. From 1989 to the present, Stover has been vice-chairman of the Sumter City-County Planning Commission. From 1966 to 1968, he was a board member of the Sumter Area Christmas Charities. From 1975 to the present, he was trustee, a steward and a church school teacher at the Mt. Pisgah A.M.E. Church. (Iris Exh. 5.)

Auxiliary Power

36. Iris proposes to install an auxiliary power source to insure the continuation of operations of the station in the event of an interruption of regular power. (Iris Exh. 7.)

CONCLUSIONS OF LAW

37. Section 307(b) of the Communications Act requires the "fair, efficient and equitable distribution" of broadcast service. An assessment of the evidence must be made under the applicable Commission standards in determin-

ing which applicant meets the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

38. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification; and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F.C.C.*, 735 F.2d 601, 603-07 (D.C. Cir. 1984). Comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership and management and the enhancement of such integration by local residence, civic activities, broadcast experience and minority and female gender preference.

Comparative Proposals

39. There are no basic qualifying issues added against these applicants. Only where substantial questions have been raised about an integration proposal will its *bona fides* be considered under the standard comparative issue. *See, e.g., N.E.O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986). Here there is no evidence to consider on the issue of the proposals' *bona fides*. But there is a separate issue of comparative coverage.

Comparative Coverage

40. The highest comparative coverage preference generally is awarded to the applicant proposing to provide a first or second service. *Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984). But in this case, none of the applicants will provide service to an underserved area. And when areas and populations are well-served, only a slight preference will be awarded to applicants proposing even substantially greater overall coverage. *See Simon Geller*, 90 F.C.C. 2d 268-269, 276 (Comm'n 1982) (slight preference awarded for coverage superiority of four times more area and 315,000 persons). An applicant would receive the lesser qualitative credit of "very slight preference" for a coverage difference of 27%. *See Barton Broadcasting Co.*, 104 F.C.C. 2d 785, 791 (Review Bd 1986). But where the differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 F.C.C. Rcd 5520, 5521 (Comm'n 1989) (coverage difference of 2% for 36,200 persons). However, a slight preference has been awarded to an applicant which provided a new third, fourth, and fifth nighttime service. *CJL Broadcasting, Inc.*, 88 F.C.C. 2d 750, 758 (Review Bd 1981), *rev'd. on other grounds*, 54 Radio Reg. 2d (P&F) 1037 (Comm'n 1983).

41. In terms of overall coverage, each of the applicants proposes to serve approximately the same population and area. Iris' population advantage of only 4,430 persons is *de minimis*. *See Susan S. Mulkey, supra*. But as for service to underserved areas, SRP is entitled to a very slight preference over Iris for its proposal to provide a new fourth service to 880 persons and a new fifth service to 3,925 persons.

Diversification

42. Neither Iris nor any of its principals owns an attributable interest in a means of mass media communication. Canty's membership on Morris College's thirty-six member board of trustees is *de minimis* (2.77%). An arithmetic attribution of that participation applied to Canty's ownership would be an even lesser 0.69%. *Cf. West Michigan Broadcasting Company* v. *F.C.C., supra* at 605 n. 6 (spouse's position on college board of trustees non-attributable).

43. Midlen owns a 40% equity interest in SRP. (SRP Exh. 1.) Thus, he has a substantial voting interest, he is acting as counsel for the applicant, and he is a general partner. (*Id.*) Barton also owns a 40% equity interest in SRP and he too is a general partner. (SRP Exh. 1.) The ownership of WSSC by Barton and Midlen is fully attributable to SRP. *Policy Statement, supra* at 395 (other interests in the principal community proposed to be served will normally be of greatest significance). And SRP receives a second diversification demerit for Barton's considerable broadcast interests through Price Broadcasting and Fort Valley. *See* Para. 14, *supra*. Therefore, SRP receives a comparatively substantial diversification demerit as against Iris.

Best Practicable Services To The Public

44. Mr. Ireland, one of three general partners, is the only partner who is proposed to integrate into the management of SRP's station. He owns only 20% of the equity. Therefore, SRP can qualify for only a 20% quantitative integration credit. But in view of the lack of any specific plan to show how he will manage two stations without identified assistant(s), and also lacking a specific work plan as dual manager, SRP will be awarded no integration credit. *Cf. Naguabo Broadcasting Company*, 6 F.C.C. Rcd 912, 924 n. 63 (Review Bd 1991), *aff'd* 6 F.C.C. Rcd 4879 (Comm'n 1991). *See also Pleasure Island Broadcasting, Inc.*, 6 F.C.C. Rcd 4261, 4265 (Review Bd 1991) (Review Board requires a "weighty showing" that multiple business commitments can be handled by a proposed station manager).

45. On the other hand, Iris qualifies for 100% integration credit. Each of the four principals will be fully integrated and the applicant has carried its burden of proof to show that the proposals for each will be effected. *Cuban-American, Ltd., supra* at 3785 (Comm'n 1990). SRP argues that because the proposals of Iris' four principals do not account for staff persons to supervise that the entire integration of Iris should be rejected. (SRP PFC at 17-18.) SRP is not in any position to complain of Iris' lack of a specific staffing plan in view of SRP's own un-staffed proposal that posits Mr. Ireland as the sole manager of two stations. More importantly however, without specific evidence, SRP's argument is only an unsupported assertion and as such it will not be afforded any weight.

46. In addition to winning hands-down on diversification and integration, Iris also has the overwhelmingly better record for long-time local residence in the community of license by the four integrated principals. By virtue of longevity, Iris also is the comparative better on related civic activities. *See Colonial Communications, Inc.*, 6 F.C.C. Rcd 2296 (Comm'n 1991). Nor does SRP's very slight coverage preference for its proposed new services meet Iris' full integration. *Beach Bdcstg Ltd. P'ship*, 6 F.C.C. Rcd 4485 (1991). The broadcasting experience claimed for Ireland and the 19 years claimed for his local residence pales when compared with the combined 128 years of local residence established by Iris. *Cf. Rebecca L. Boedker*, 6 F.C.C. Rcd 2557, 2559 (Comm'n 1991). In

fact, the comparative factors are so heavily weighed in favor of Iris that the minority or female preference to which Iris would otherwise be entitled are redundant credits and need not be considered.

Summary Conclusions

47. Iris is the conclusive winner by virtue of its 100% integration, its superior local residence, and its civic affairs credit. Iris' comparative victory for a superior integration proposal is even further buttressed by SRP's substantial diversification demerit.

ORDER

Based on the foregoing, IT IS ORDERED that unless an appeal from this *Decision* is taken by SRP, or unless the Commission reviews this *Decision* on its own motion,[4] the application of Sumter Radio Partners (File No. BPH-880310NM) IS DENIED.

IT IS FURTHER ORDERED that the application of Iris Communications, Inc. (File No. BPH-880310NS) for authority to construct a new FM Station on Channel 234A at Sumter, South Carolina IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Initially there were five party applicants. Palmetto Radio, Inc. was dismissed for its failure to appear and pay the hearing fee. *Order* FCC 90M-1110, released May 8, 1990. Pam S. Adkins & Lee S. Senter were dismissed voluntarily. *Order* FCC 90M-2968, released September 19, 1990. Sharron Annette Haley was dismissed by the Presiding Judge for failure to show a reasonable assurance of financing to construct and operate the station. *Memorandum Opinion and Order*, FCC 91M-246, released January 23, 1991, *aff'd* 6 F.C.C. Rcd 1567 (Review Bd 1991), *aff'd*, 6 F.C.C. Rcd 4630 (Comm'n 1991).

[2] Former applicant Sharron Annette Haley was dismissed by the Presiding Judge in a final interlocutory ruling on January 23, 1991, after the PFC and RPFC were filed. *See* fn 1., *supra* for case history. Since it was a final dismissal with prejudice that was appealable as a matter of right, the initial decision was deferred until after appeals to the Review Board and the Commission became final on July 31, 1991 (FCC 91-231). *See Order* FCC 91M-847, released March 5, 1991 and Commission Rule §1.291(d) (Initial Decisions do not become final until outstanding appeals to Review Board and Commission are disposed of and time to appeal to Commission has expired).

[3] Activities of a broad nature, such as NAACP, which are not specifically tied to Sumter or Sumter's service area will not be credited.

[4] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1134 **Released: October 24, 1991**

SATELLITE APPLICATIONS ACCEPTABLE FOR FILING

The following applications have been received in response to Public Notice, DA-91-407 (April 1, 1991) establishing a cut-off date for filing applications for satellite systems to provide radiodetermination satellite service (RDSS) in the 1610-1625.5 MHz and 2483.5-2500 MHz bands. The Commission has found, upon initial review, that all are acceptable for filing. The Commission reserves the right to return any of these applications, however, if, upon further review, it is determined that they are defective or not in conformance with the Commission's rules, regulations and policies.

All applicants request waivers of Sections 2.106 and 25.392(d) to enable them to provide a variety of mobile satellite services (MSS) in the RDSS bands. Several have filed concurrent Petitions for Rulemaking requesting a formal reallocation for MSS in these bands. *See* Public Notice, Report No. 1855 (released August 13, 1991) and Public Notice, *Petitions for Rulemaking Filed and Order Extending Time for Comments*, (released September 13, 1991).

AMSC SUBSIDIARY CORPORATION **File Nos. 15-DSS-MP-91, 16-DSS-MP-91**

AMSC Subsidiary Corporation (AMSC Subsidiary) has filed two applications for authority to modify its mobile-satellite service (MSS) authorization for the 1545-1559 MHz and 1646.5-1660.5 MHZ bands (upper L-band). AMSC Subsidiary proposes to modify its MSS satellites located at 139^0 and 62^0 W.L. to add the 1515-1525 MHz (downlink) and the 1616.5-1626.5 MHz (uplink) frequency bands for service links and Ku-bands for feeder links. If the 1515-1525 MHz band cannot be reallocated to MSS, AMSC Subsidiary requests that the Commission allocate a 10 MHz MSS downlink band in a portion of the 2110-2130 MHz, 2160-2180 MHz or 1850-1990 MHz bands, in that order of preference.

Proposed services remain the same as those that can be offered on its upper L-band system with the addition of land mobile safety services.

CONSTELLATION COMMUNICATIONS, INC. **File Nos. 17-DSS-P-91(48), CSS-91-013**

Constellation Communications, Inc. (Constellation) has filed an application for authorization to construct a low earth orbit satellite system consisting of forty-eight microsatellites organized into four polar planes of twelve satellites. Constellation requests the following frequency assignments for this system, which it calls the ARIES satellite system:

Earth-to-Space:	1624.5-1626.5 MHz band
Space-to-Earth:	2483.5-2500 MHz band
Feeder Links:	3 MHz of frequency in the 5150-5216 MHz band (e.g., 5163.5-5166.5) and 3 MHz of frequency in the 6525-6541.5 MHz band (e.g., 6538.5-6541.5) plus an additional 1.5 MHz in the 5150-5216 MHz band (e.g., 5150-5151.5 MHz) for telemetry/beacons

The ARIES satellite system is to provide coverage of all the points on the earth's surfaces. The earth segment will consist of a master telemetry, tracking and control earth station, a technical operation control center earth station, an interconnected system of gateway earth stations, and over 100,000 user terminals. The ARIES subscriber terminals are vehicle mounted terminals and lightweight portable units comparable to current cellular telephone equipment.

Proposed services include RDSS; two-way telephony; dispatch voice; data/facsimile transmission; thin-route and lifeline telephone; and data collection, distribution and control services. These services can be provided to mobile and fixed units dispersed over wide geographic areas or to rural or remote areas not likely to be served by other mobile radio services.

The frequency plan for the ARIES satellites is based on a total of 2 MHz being assigned to the ARIES satellite system in the L-band and spread spectrum use, on a non-exclusive basis, of 16 MHz at S-band for the links between mobile users and satellites. The satellites are to be designed with a peak capacity of up to 50 two-way voice channels. Constellation states that the ARIES frequency plan is intended to allow multiple users in the RDSS bands, including RDSS systems using geostationary satellites and other LEO systems.

Constellation proposes to begin construction of its ARIES-Plane 1, which consists of twelve satellites, within one year of grant and to have the entire system operational within four years of grant.

ELLIPSAT CORPORATION **File No. 18-DSS-P-91(18)**

Ellipsat has filed an application for authority to construct a second generation elliptical orbit satellite system consisting of eighteen satellites, which it calls the Ellipso II satellite system. (Ellipsat's application for its first generation system - ELLIPSO I - was previously filed and placed on public notice. *See* Public Notice, DA 91-407 (April 1, 1991). Ellipsat proposes operation in the following frequency bands for both service links and feeder links:

Earth-to-space (uplink):	1610-1626.5 MHz
Space-to-Earth (downlink):	2483.5-2500 MHz

Proposed services include RDSS and mobile satellite voice services capable of interconnecting with the public switched network and cellular mobile telephone switching offices within the continental United States and domestic

off-shore points. The ELLIPSO system will provide continuous, twenty-four hour coverage of the United states. Access to the ELLIPSO system is proposed to be offered through value added partners (VAPs) who will sell ELLIPSO services to end-users. Service is to be provided over low-cost mobile terminals or by adding an additional RF unit and antenna to an existing digital cellular equipment.

Ellipsat intends to provide multiple entry and competitive services through the use of spread spectrum code division multiplex access (CDMA) which it claims will allow other complementary systems to co-exist with ELLIPSO.

Ellipsat proposes to provide initial commercial service in March 1993 to presently unserved target populations and areas in the United States, primarily roamers outside metropolitan areas and rural users. Ellipsat anticipates that the first phase of its system, consisting of the six ELLIPSO I satellites, will be operational in March 1993, with the full CONUS service in place by July 1994 (with the launch of the ninth ELLIPSO II satellite).

LORAL CELLULAR SYSTEMS, CORP. — **File Nos. 19-DSS-P-91(48) CSS-91-014**

Loral Cellular Systems, Corp. (Loral) has filed an application for authority to construct a global low-Earth orbit satellite system consisting of forty-eight satellites, which it calls the GLOBALSTAR satellite system. Loral proposes alternative spectrum plans. System A makes bidirectional use of the allocated RDSS spectrum, on a primary basis, in the 1610-1626.5 MHz band by utilizing TDD-FD/CDMA, with C-band (5199.5-5216.0 MHz and 6525.06541.5 MHz) feeder links. System B utilizes 1610-1626.5 MHz for mobile to spacecraft link and 2483.5-2500 MHz for spacecraft to mobile link, with C-band feeder links. GLOBALSTAR presents an alternative, System C, in the event that the Commission determines that this service may not utilize the C-band for feeder links.

GLOBALSTAR is to use a constellation of 24 operating LEO satellites to provide global coverage with services optimized in the continental United States. When international services are authorized, additional satellites will be launched and the 48-satellite constellation will then provide global coverage with additional performance in the United States. Each satellite is to have six spot beams to coverage cells on the surface of the earth for links between mobile users and the satellites. Use of spread spectrum techniques is to permit the spectrum to be reused 288 times. Loral states that the 24-satellite configuration will be able to serve a minimum of 5000 users simultaneously. The system has been configured to link the mobile unit to a terrestrial gateway through a single satellite, requiring no satellite traffic crosslinks. In addition, Loral states that the GLOBALSTAR system is to operate compatibly with other LEO satellite systems providing RDSS, voice and data services, and without causing interference to geostationary RDSS systems.

Proposed services include RDSS, voice and data service with connections directly to and from the Public Switched Telephone Network (PSTN) and voice and data service with connection directly to and from various private networks. Services are proposed on a non-common carrier basis, selling capacity to carriers and specialized communications networks. GLOBALSTAR transceivers are to be similar to proposed digital cellular telephones in size. Each digital transceiver will have a single call-up number and unique serial number that will allow the end user to make and receive calls from or to that device anywhere in the world where service is authorized.

Loral expects to have satellites constructed and ready for launch forty-nine months after an authorization is granted.

TRW, INC. — **File Nos. 20-DSS-P-91(12) CSS-91-015**

TRW, Inc. (TRW) has filed an application for authorization to construct a low-Earth orbit satellite system consisting of a constellation of twelve satellite, four in each of three planes. This system, which it calls the ODYSSEY satellite system, is to permit multi-regional coverage without the necessity of intersatellite crosslinks. In addition to C-band frequencies which will be needed for launch operations, TRW proposes to operate in the following frequency bands:

Uplinks:	1610-1626.5 MHz
Downlinks:	2483.5-2500 MHz
Feeder Links -	
Earth-to-Space:	29.5-30.0 GHz
Space-to-Earth:	19.7-20.2 GHz

TRW proposes the use of CDMA spread spectrum modulation techniques in both subscriber uplinks and downlinks. Use of this technique permits multiple providers, allowing an open-entry, competitive environment. Subscriber units will be small handheld portable transceivers. Proposed services include RDSS, voice and data services to mobile users in all 50 states and U.S. territories, much of Canada and all of Mexico. Further, services are proposed on a non-common carrier basis. TRW intends to sell or lease capacity on ODYSSEY in bulk to individual service providers, who in turn will provide the specific services to individual user entities and the public.

Construction of all satellites is expected to commence upon grant and the first launch is anticipated two years after grant with the system fully operational within four years of grant. Comments or petitions regarding these applications may be filed on or before **December 18, 1991.** Replies and oppositions may be filed on or before **January 17, 1992.** Responses may be filed on or before **February 7, 1992.**

For further information, contact Kathleen Campbell at (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-290

In re Applications of

JHONNY V. GOMEZ (hereafter "Gomez")	File No. BPH-901121MB
NORTH PLAINS BROADCASTING CORPORATION (hereafter "NPBC")	File No. BPH-901123MB
MANDUJANO COMMUNICATIONS, INC. (hereafter "MCI")	File No. BPH-901123MC
JR COMMUNICATIONS CORPORATION (hereafter "JR")	File No. BPH-901123MA (DISMISSED HEREIN)
B.F.J. TIMM (hereafter "Timm")	File No. BPH-901123MD (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 265C1 (100.9 MHz)
in Amarillo, Texas

HEARING DESIGNATION ORDER

Adopted: September 26, 1991; Released: October 24, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* JR and Timm have not paid the required hearing fee by July 15, 1991, the date set forth in *Public Notice*, Mimeo No. 13110, released May 15, 1991. Their applications will therefore be dismissed. *See* revised Section 73.3573(g)(2) of the Commission's Rules and *Report and Order* in Gen. Doc. 90-264 ("Proposals to Reform the Commission's Comparative Hearing Process"), 6 FCC Rcd 157, 157-158 and 170 (1990); *Erratum*, 6 FCC Rcd 3472 (1991); *recon. granted in part*, 6 FCC Rcd 3403 (1991).

3. *NPBC.* Section II, Item 3 of FCC Form 301 requires non-individual applicants to "provide the date and place of filing of the applicant's enabling charter." NPBC, a corporation, did not respond to Item 3. Accordingly, NPBC will be required to submit to the presiding Administrative Law Judge within 30 days of the release of this Order, an amendment which gives the information required by Section II, Item 3.

4. Section II, Item 6 of FCC Form 301 (1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. NPBC has not completed Item 6 correctly. NPBC's application fails to list the applicant and the required specific information about the applicant itself as requested in Item 6. Accordingly, NPBC must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the applications of JR and Timm ARE DISMISSED, pursuant to 47 C.F.R. § 73.3573(g)(2).

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, NPBC shall provide to the presiding Administrative Law Judge the information required in Paragraph 3 hereinabove.

10. IT IS FURTHER ORDERED, That NPBC shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301 (1989), to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division,

Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

12. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant of Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90264), 6 FCC Rcd 157, 160-1, 166, 168 (1990) (*Erratum*, DA 91-654, released June 6, 1991), *on reconsideration*, FCC 91-154, paras. 7-8 & n. 3, Appendix paras. 3 & 5, released May 15, 1991.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 81-893

In the Matter of

Procedures for Implementing The
Detariffing of Customer Premises
Equipment and Enhanced Services
(Second Computer Inquiry)

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1991; Released: October 24, 1991

By the Commission:

I. INTRODUCTION

1. In our *Tentative Decision on Remand*,[1] we reexamined our decision to require the American Telephone and Telegraph Company ("AT&T") to pay the Bell Operating Companies ("BOCs") net book value plus refurbishment costs for the "refurbished inventory CPE"[2] transferred to AT&T Information Systems, Inc. ("ATTIS") at divestiture, in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *ATTIS v. FCC*.[3] We tentatively concluded, in light of principles set out in *Democratic Central Committee*[4] and reiterated by the Court in *ATTIS v. FCC*, that the transfer price for refurbished inventory CPE should be net book value, not net book value plus refurbishment costs.

2. Four parties commented on our *Tentative Decision*, and four parties replied.[5] After full consideration of the parties' positions and our own analysis, we decide to implement our proposal, as set forth in the *Tentative Decision*, to require AT&T to pay the BOCs net book value for refurbished inventory CPE transferred to ATTIS at divestiture.

II. BACKGROUND

3. The *Tentative Decision* discussed the history behind the Commission's efforts to determine the economic value of refurbished inventory CPE at the point when it was transferred from the BOCs to ATTIS. Briefly, in the first *Report and Order* in this proceeding,[6] the Commission concluded that "embedded CPE"[7] should be transferred at its "economic value" to ATTIS as of January 1, 1984, the date of the divestiture of the Bell System. The Commission defined "economic value" as "the price a carrier would be willing to pay for its CPE if, instead of owning it, the carrier had the opportunity to purchase it."[8] However, since it was not feasible to measure the economic value of millions of pieces of CPE with any degree of certainty, the Commission determined that net book value was an acceptable surrogate for economic value for purposes of establishing the price AT&T would pay for the equipment to be transferred.[9]

4. Although it decided that net book value was an acceptable surrogate for the economic value of all the CPE that was to be transferred, the Commission applied that decision only to embedded in-place CPE and unrefurbished inventory CPE.[10] The Commission determined that the transfer price for refurbished inventory CPE should equal net book value plus refurbishment expenses. The Commission believed that refurbishment had increased the economic value of refurbished inventory CPE and that ratepayers would not have the opportunity to realize any gain associated with that increase, absent inclusion of refurbishment expenses in the transfer price. On reconsideration, the Commission affirmed its decision to estimate, collectively, the average economic value of in-place CPE and unrefurbished CPE at net book value while attempting to determine separately the economic value of refurbished inventory CPE. AT&T objected to this separation and claimed that refurbishment had not raised the economic value of inventory CPE above its net book value.[11]

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[1] Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, *Tentative Decision on Remand*, 5 FCC Rcd 7257 (1990) (*Tentative Decision*).

[2] Refurbished inventory CPE is customer premises equipment (CPE) that had been removed from service and refurbished, but not returned to service, prior to being transferred to ATTIS.

[3] AT&T Information Systems, Inc. v. FCC, 854 F. 2d 1442 (D.C. Cir. 1988) (*ATTIS v. FCC*).

[4] Democratic Central Committee v. Washington Metropolitan Area Transit Comm'n, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974) (*Democratic Central Committee*).

[5] The parties that filed Comments are AT&T, The Bell Atlantic Telephone Companies (Bell Atlantic), New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) and Pacific Bell (Pacific). Reply Comments were filed by AT&T, Bell Atlantic, NYNEX and Southwestern Bell Telephone Co. (SWBT).

[6] Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, 95 FCC 2d 1276 (1983) (*Report and Order*), *recon.*, 50 Fed. Reg. 9016, FCC 85-35 (released Jan. 29, 1985) (*Reconsideration Order*), remanded, *ATTIS v. FCC*, *supra*.

[7] CPE in existence prior to 1983 and in use by Bell System customers or in Bell System inventories as of January 1, 1983, is called "embedded CPE." CPE obtained after January 1, 1983, is called "new CPE." *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Memorandum Opinion and Order on Further Reconsideration*, 88 FCC 2d 512, 527-8 (1981).

[8] *Report and Order*, 95 FCC 2d at 1306.

[9] The Commission defined net book value as original cost less related depreciation reserves. *Report and Order*, 95 FCC 2d at 1306 n. 40.

[10] In-place CPE consists of CPE that was in use by the Bell System customers as of divestiture. With in-place embedded CPE, the Commission found that ratepayers were protected by the opportunity to capture any gains in value through purchase because, according to the terms of the in-place sales program, net proceeds could not exceed the aggregate net book value of the in-place CPE.

[11] *See Reconsideration Order*, slip op. at 44-45.

5. In *ATTIS v. FCC*, the D.C. Circuit held that the Commission had failed to provide reasoned support for including refurbishment expenses in the transfer price for refurbished inventory CPE and remanded the case to the Commission in light of the principles set forth in *Democratic Central Committee*. In particular, the court accepted the Commission's decision generally to use net book value as the proxy for the aggregate economic value of transferred equipment, but questioned its "abandon[ment]" of this principle with respect to refurbished inventory CPE. The court stated that the Commission had failed to take into account the possible risk of loss faced by AT&T's investors on refurbished inventory CPE, given changes in technology, obsolescence and other factors.[12] It also admonished the Commission for not properly applying the two principles enunciated in *Democratic Central Committee*. The first, or "risk-of-loss," principle, states "that the right to capital gains on utility assets is tied to the risk of capital losses" while the second, or "benefits-burdens" principle, provides "that those who bear the financial burden of particular utility activity should also reap the benefit resulting therefrom."[13]

6. In the *Tentative Decision*, we attempted to apply *Democratic Central Committee*, as the court required, and tentatively found that since ratepayers had borne the risk of capital losses on refurbished inventory CPE prior to its transfer to ATTIS, ratepayers should receive the benefit of any gain in the value of that CPE prior to its transfer.[14] Once we concluded that the ratepayers had borne the risk of loss, *Democratic Central Committee* requires that they receive the full economic value of the CPE transferred to ATTIS.[15] We therefore also reaffirmed the Commission's previous decision that the transfer price for refurbished inventory CPE should equal its economic value. We tentatively concluded, however, that net book value, not net book value plus refurbishment costs, is the most acceptable and reasonable surrogate for the economic value of refurbished inventory CPE.

7. In trying to measure the economic value of the transferred refurbished inventory CPE, we reaffirmed our conclusion that there is no workable method for determining with any certainty the economic value of embedded CPE, including the economic value of refurbished inventory CPE as of January 1, 1984. Therefore, we tentatively concluded that, as with all other embedded CPE, we should not attempt to measure separately the economic value of refurbished inventory CPE. As a corollary, we also tentatively concluded that since the Commission used net book value as a surrogate for economic value for all other categories of CPE, such a surrogate should also be used when valuing the transfer price for refurbished inventory CPE because though refurbishment may have increased the economic value of inventory CPE above net book value, other factors may have decreased that value to net book or, below net book value. We asked all interested parties to comment on our *Tentative Decision* and, in particular, to suggest any alternative method for determining more precisely the "economic value" of refurbished inventory CPE in light of the opportunities and risks AT&T faced at the time of divestiture.

III. POSITIONS OF THE PARTIES

8. AT&T supports our decision to value refurbished inventory CPE at net book value and not net book value plus refurbishment costs. AT&T puts forth three reasons as to why we should adopt our *Tentative Decision* as proposed. First, AT&T contends that we should value all transferred CPE, in the aggregate, at net book, which represents the average "economic value" of all CPE. In this way, we would be prevented from "clipp[ing] the peaks for CPE having a higher value, without 'filling the valleys' on those other items of CPE whose market values were less than the average net book cost."[16] In addition, AT&T argues that we should never have attempted in the first place to value refurbished inventory CPE separately from all other categories of embedded CPE.

9. Second, AT&T claims that net book value adequately reflects the BOCs' refurbishment expenses because refurbishment extended the CPE's service life. This, according to AT&T, permitted lower depreciation accruals and a higher net book value paid by AT&T to the BOCs which, in turn, led to a larger reduction in the BOCs' rate base. Therefore, according to AT&T, any proposal to value refurbished inventory CPE at net book value plus refurbishment costs would double-charge AT&T for the value of the refurbishment.[17] Related to this, AT&T claims that the CPE was in fact underdepreciated and hence net book value "overreflects" refurbishment costs.[18] Third, AT&T maintains that CPE in the aggregate, and refurbished inventory CPE in particular, have an economic value lower than net book value due to obsolescence and the importation of inexpensive competition.[19] AT&T also states that no party has presented any evidence that the economic value of the embedded CPE, in the aggregate, exceeded its net book value.[20]

10. Pacific, Bell Atlantic, NYNEX and SWBT urge us not to adopt our *Tentative Decision* and instead recommend that we set the transfer price for refurbished inventory CPE at net book value plus refurbishment costs. All three agree that a surrogate for economic value must be used in valuing refurbished inventory CPE. No party, though, offers a study or suggests a clear method by which one might be performed. Both NYNEX and Bell Atlantic specifically note that the D.C. Circuit remanded the case to us because it found that we had failed to justify the Commission's assumption regarding the economic value of refurbished CPE, not because that assumption was inherently incorrect. In their Reply Comments, both

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[12] *See ATTIS v. FCC*, 854 F.2d at 1446-7.

[13] *Democratic Central Committee*, 485 F. 2d at 806, 808.

[14] The Commission had previously concluded that ratepayers bore the risk of loss on all categories of embedded CPE prior to its transfer to ATTIS. *See* Procedures for implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), Notice of Proposed Rulemaking, 94 FCC 2d 76, 90-91 (1983) (*Notice of Proposed Rulemaking*); *Report and Order*, 95 FCC 2d at 1306, 1319.

[15] Once we concluded that ratepayers had borne the risk of loss, we were precluded from applying the second, or "benefits-burdens," principle of *Democratic Central Committee*. *ATTIS v. FCC*, 854 F2d at 1444, 1447.

[16] AT&T Comments at 6; AT&T Reply at 3-4.

[17] AT&T Comments at 7-8; AT&T Reply at 3.

[18] *See* AT&T Comments at 8-9.

[19] AT&T states that much of the unrefurbished inventory CPE had to be scrapped. *See* AT&T Comments at 9; AT&T Reply at 3-4.

[20] AT&T Comments at 7; AT&T Reply at 1-2.

SWBT and Bell Atlantic claim that the *Tentative Decision* failed to comport with the court's demand that we justify our decision to value the transfer price for refurbished CPE at net book value plus refurbishment costs and not net book value. Therefore, both parties claim that we are simply adopting "a new unsupported conclusion" for the economic value of the CPE.[21]

11. Pacific, Bell Atlantic and NYNEX claim that, unlike our supposed conclusion to the contrary, refurbishment increased the economic value of the inventory CPE.[22] NYNEX counters AT&T's argument that the net book cost of the CPE, in the aggregate, took into account the value of refurbishment through "underdepreciation." NYNEX remarks that since we have determined that it is impracticable to ascertain the economic value of refurbished CPE as of January 1, 1984, it is also unlikely that we could have ascertained whether underdepreciation applied at that time.[23] In addition, NYNEX maintains that though net book value consists of original cost less related depreciation reserves, any increased value due to refurbishment was not included in the "CPE's net book value as of January 1, 1984.[24]

12. Both Bell Atlantic and Pacific emphasize that we should conduct an investigation to determine the "true" economic value of the refurbished CPE received by AT&T at divestiture.[25] Bell Atlantic notes that the court did not require that we determine the CPE's "exact" or "certain" economic value. Therefore, claims Bell Atlantic, we should "initiate an investigation to develop a *reasonable* estimate of the value of this refurbished CPE" by requiring AT&T to produce cost and sale records for "a statistically representative sample of refurbished CPE."[26] AT&T counters such arguments by claiming that a study would be costly and cause uncertainty and delay because "the Bell System and subsequent AT&T CPE asset records were kept on overall accounts and did not segregate and record CPE on a piece by piece basis."[27] Also, in response to Bell Atlantic's suggestion that AT&T produce cost and sales records for a statistically representative sample of refurbished CPE, AT&T contends that there are no accounting records that identify which specific CPE items were refurbished in 1983 as opposed to 1984. In addition, AT&T indicates that for a study to be fair and valid all transferred CPE, not just refurbished inventory CPE, would have to be included. AT&T asserts that such a study would lead to the conclusion that the transferred CPE had an economic value "at much *less* than net book cost, not more."[28]

13. In its Reply, AT&T asserts that refurbishment did not necessarily increase the economic value of CPE above its net book cost. NYNEX states that there is no proof that all CPE transferred, including refurbished inventory CPE, had an economic value less than net book value, particularly since neither the Commission nor AT&T found a "proper" surrogate for the economic value of refurbished inventory CPE.[29] Both NYNEX and Bell Atlantic claim that the court's remand was confined to the question of the economic value of refurbished CPE and therefore any reference to net book value as a surrogate for the economic value of all other CPE is irrelevant. Bell Atlantic also suggests that the fact that AT&T scrapped other, non-refurbished CPE is unconnected to the determination of the value of refurbished CPE "because the value of other CPE is not at issue here."[30]

IV. DISCUSSION

14. After reviewing our *Tentative Decision*, the parties' positions and *Democratic Central Committee*'s requirement that any gains resulting from the transfer to ATTIS should flow to the parties bearing the initial risk of loss, we reaffirm that the proceeds from the transfer of this CPE should go to ratepayers and the price should equal its economic value. We also conclude that net book value, not net book value plus refurbishment costs, is the most acceptable and reasonable surrogate for the economic value of refurbished inventory CPE.

15. As a preliminary matter, we affirm that under the "risk-of-loss" principle of *Democratic Central Committee*, ratepayers are entitled to the benefit of any gain in value of refurbished inventory CPE because they bore the risk of any loss in value. No party disputes this conclusion. Accordingly, we do not reach the "benefits-burdens" principle of *Democratic Central Committee*. As to how to measure that value, in its prior decision the Commission feared that, if refurbishment increased the economic value of inventory CPE above its net book value, ratepayers would be prohibited from receiving the gain. Out of an abundance of caution, the Commission chose net book value and refurbishment costs as a surrogate for the refurbished inventory CPE's economic value. After reevaluating the record plus the comments filed in response to our *Tentative Decision*, we cannot determine that refurbishment increased the CPE's economic value above its net book value or that there are sufficient differences between embedded in-place CPE, unrefurbished inventory CPE and refurbished inventory CPE to warrant separate treatment. Without such differences and evidence that ratepayers are in fact harmed by the use of net book value, we believe that net book value represents the most practical surrogate for the economic value of refurbished inventory CPE.

16. Measuring that economic value in light of the opportunities and business risks AT&T faced at the time of divestiture continues to be the most difficult task. Notwithstanding our invitation, none of the commenting parties performed a study or suggested a method by which one might be performed. The commenting BOCs simply recommend that we conduct a study to determine the CPE's "true" economic value. In our *Tentative Decision* we tentatively concluded that it would not be practical to attempt to determine the economic value of the refur-

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[21] Bell Atlantic Reply at 4; SWBT Reply at 2.

[22] NYNEX Comments at 3 ("...1983 refurbishment costs increased the CPE's value at least dollar-for-dollar...."); *see also* Bell Atlantic Reply at 3 n. 7.

[23] NYNEX Reply at 3-4.

[24] NYNEX Comments at 4; *see also* Bell Atlantic Reply at 3; NYNEX Reply at 4 ("since refurbishment was expensed (not capitalized), the 1983 refurbishment expenses were not added to net book cost.")

[25] *See* Pacific Comments at 4-5; Bell Atlantic Comments at 3-4.

[26] *See* Bell Atlantic Comments at 3-4 (emphasis added); *See also* Bell Atlantic Reply at 1 ("... AT&T should be required to provide the data which show the revenues it received for the refurbished CPE transferred to it at divestiture.")

[27] AT&T Reply at 6.

[28] *Id.* at 5 (emphasis in original).

[29] NYNEX Reply at 3.

[30] Bell Atlantic Reply at 2-3.

bished inventory CPE transferred to ATTIS.[31] After full consideration of the many variables needed to perform a study, we conclude that undertaking such an investigation would not be worthwhile or of benefit to ratepayers. We believe that no study that is feasible, given our resources, could generate enough information to assure us that the results would be any more fair or accurate than the *Tentative Decision*'s proposal to measure the value of refurbished inventory CPE at net book value.

17. Were we to undertake a study we would have to begin by making assumptions regarding AT&T's efforts to achieve profits in the immediate postdivestiture period. It is possible to ascertain certain costs incurred by AT&T such as overhead, advertising and management costs. One should note, however, that in order to establish AT&T's costs, particularly corporate overhead, we would need to devise a method for allocating such costs to refurbished inventory CPE from among AT&T's various business enterprises. Such a study would impose significant costs and much of the data is no longer readily available or subject to verification. Moreover, it would be extremely difficult to determine in retrospect the full range of factors that might have affected AT&T's CPE business and the transfer price that would have given AT&T an opportunity to receive an adequate return in view of those factors. Because we cannot prove with any certainty or accuracy the economic value of refurbished inventory CPE in light of the circumstances at the time of divestiture, we are unable to determine that there was a gain above or loss below net book value. Hence, we conclude that we should maintain net book value as a *reasonable* estimate of the CPE's economic value.

18. Only Bell Atlantic suggests what may resemble an attenuated methodology by recommending that AT&T produce cost and sales records for a statistically representative sample of refurbished inventory CPE. Unfortunately, Bell Atlantic does not explain precisely how this information would enable us to determine the economic value of even the refurbished inventory CPE within this sample and it does not appear such a study would produce statistically reliable information. We believe that any analysis of the information would require that we estimate all factors, not just AT&T's costs, as of January 1, 1984. Further we would have to devise a method to allocate AT&T's costs among all categories of CPE.[32] Since no party has suggested a basis for performing these allocations, such an exercise would require that we arbitrarily shift costs among all categories of CPE, including refurbished inventory CPE, with no evidence that this would produce reliable results.

19. In *ATTIS v. FCC*, the Court approved the Commission's decision, set forth in the *Report and Order*, to rely on net book value as a proxy for the aggregate economic value of the embedded CPE that was to be removed from the rate base. The Court supported the Commission's decision to use net book value as a method of "averaging out" the differences between those pieces of CPE whose economic value fell below net book value and those which fell above. The Court, however, found that when dealing with refurbished inventory CPE, the Commission had "abandoned the averaging principle that had guided [its] treatment of the other categories of embedded CPE" and that the Commission had failed "to consider the possibility of investors' losses as required by *Democratic Central*[Committee]."[33] The Commission originally chose net book value as a broad surrogate because we were unable to determine whether there was a gain or loss attributable to any one category of CPE. Consistent with this approach, we conclude that we should now use net book value as a surrogate for economic value for *all* categories of embedded CPE in the aggregate. In this way we ensure to the extent reasonably feasible that AT&T properly compensates ratepayers for the risk of loss they bore while CPE was under regulation, without imposing a requirement that might overcompensate those ratepayers.

20. The commenting BOCs assume that refurbishment increases the economic value of the CPE "dollar-for-dollar" and that this value was not reflected in the net book value as of January 1, 1984. Though refurbishment should increase the economic value of CPE "dollar-for-dollar", it does not necessarily increase the CPE's value above net book value. As we stated before and as the court reiterated, market forces, obsolescence, new technologies, competition from inexpensive and innovative imported CPE, and other factors, all of which were not necessarily incorporated into the depreciation rates for refurbished inventory CPE, may have decreased the CPE's economic value to net book value or, possibly below net book value.[34] In addition, the argument that the supposed "increase" in economic value was not included in the CPE's net book value as of January 1, 1984 is simply an assumption. The correctness of such an assumption depends on how accurate the Commission's depreciation methods were and how close depreciation permitted the net book value to equal the CPE's true economic value. The BOCs are simply suggesting another assumption which is no better or convincing than the assumption the Commission originally devised for all other CPE and which the court's decision in *ATTIS v. FCC* supports -- that embedded CPE should be valued at net book value because it is the fairest and most reasonable method to ensure that both investor and ratepayer interests are protected.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, That pursuant to Sections 1, 4(i), 4(j), 201-205, 213, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), 201-05, 213, 218, 220, and 403, the transfer price for refurbished inventory CPE transferred to the American Telephone and Telegraph Company Information Systems, Inc. as of January 1, 1984 shall be net book value.

22. IT IS FURTHER ORDERED, That the Secretary shall serve a copy of this Memorandum Opinion and Order on state regulatory commissions.

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[31] *Tentative Decision* at para. 11; *See also Report and Order*, 95 FCC 2d at 1307-10; *Notice of Proposed Rulemaking*, 94 FCC 2d at 91; *Notice of Inquiry*, 89 FCC 2d at 698-99.

[32] As to in-place CPE, unlike both refurbished and unrefurbished inventory CPE, "ATTIS was required to submit monthly reports of its revenues from the mandatory sales and to relate those revenues to the total net book value of in-place CPE." *ATTIS v. FCC*, 854 F. 2d at 1445.

[33] *Id.* at 1447. Net book value balances out the gains and losses AT&T experienced with divestiture.

[34] *Tentative Decision* at para. 14; *ATTIS v. FCC*, 854 F.2d at 1447.

23. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-194

In the Matter of

Amendment of Section 73.202(b), RM-7721
Table of Allotments,
FM Broadcast Stations.
(San Angelo, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 8, 1991; Released: October 24, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Cary Fitch ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4276 (1991), proposing the allotment of Channel 261A to San Angelo, Texas, as the community's eighth local FM transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. Comments were also filed by Earshot Broadcasting, Inc. ("Earshot") and by KGKL, Inc. ("KGKL").[1] Petitioner filed reply comments.

2. In its opposition, KGKL, licensee of Station KGKL-FM, San Angelo, Texas, argues that the proposed allotment would not serve the public interest because it wastes valuable spectrum and would weaken a saturated radio market while providing only marginal, speculative public benefits. KGKL states that the San Angelo economy is on "a downward spiral." It also argues that a Class A station would operate at a "substantial competitive disadvantage." Petitioner argues that KGKL's claims are "inaccurate, inappropriate and misleading." San Angelo, petitioner states, is a moderate-sized community which has increased its population from 75,140 (1980 U.S. Census) to 85,474 (1990 U.S. Census), which is a growth of more than 13.6%. Petitioner argues that the community has a stable economy and that KGKL's claim of a "downward economic spiral" is unfounded. Petitioner asserts that the proposed allotment would serve the public interest and that KGKL's allegations are self-serving and unsupported.

3. It is Commission policy that economic impact arguments in opposition to proposed new FM allotments are not persuasive and are no longer valid. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *aff'd* 4 FCC Rcd 2276 (1989). Therefore, we believe that the public interest would be served by the allotment of Channel 261A to San Angelo, since it would provide the community with its eighth local FM transmission service. Channel 261A can be allotted to San Angelo in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site without the imposition of a site restriction.[2] Concurrence by the Mexican government has been obtained, since San Angelo is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
San Angelo, Texas	225C1, 230C1, 234C1, 248C1, 254C, 261A, 270C1, 298C1

5. The window period for filing applications will open on **December 10, 1991,** and close on **January 9, 1992.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Earshot, licensee of Station KELI-FM, Channel 254C, San Angelo, Texas, takes no position with respect to this proceeding. Instead, it requests the correction of the FM Table of Allotments, which erroneously reflects the allotment of Channel 254C1 to San Angelo, to specify Channel 254C. We will make the editorial change in the context of this proceeding. Since the correction is editorial in nature, a public notice and comment proceeding is unnecessary. *See* 5 USC 553b(A) and (B).

[2] The coordinates for Channel 261A at San Angelo are North Latitude 31-27-48 and West Longitude 100-26-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-303

In the Matter of

Amendment of Section 73.202(b),	RM-6707
Table of Allotments,	RM-6799
FM Broadcast Stations.	RM-7754
(Bay Minette, Butler & Evergreen,	RM-7813
Alabama, and Bay Springs, Ellisville	
& Waynesboro, Mississippi)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: October 10, 1991; Released: October 24, 1991

Comment Date: December 16, 1991
Reply Comment Date: December 31, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration are four separately filed conflicting petitions for rule making. The first petitioner, Butler Broadcasting Corporation ("Butler Broadcasting"), licensee of Station WQGL, Butler, Alabama, requests the substitution of Channel 228C2 for Channel 228A and modification of its license to specify operation on the higher class channel. Cotton Valley Broadcasting Co. ("Cotton Valley"), licensee of Station WIZK-FM, Bay Springs, Mississippi, proposes the substitution of Channel 232A for Channel 228A and modification of its license accordingly. Butler Broadcasting and Cotton Valley jointly filed this petition (RM-6707). The second petitioner, G. Dean Pearce ("Pearce"), requests the allotment of Channel 232C2 to Ellisville, Mississippi, as that community's second local broadcast service (RM-6799). The third petitioner, Faulkner-Phillips Media, Inc. ("Faulkner-Phillips"), licensee of Station WMML-FM, Bay Minette, Alabama, requests the substitution of Channel 288C3 for Channel 288A, Bay Minette and modification of its license accordingly (RM-7813). In order to accommodate this change, Faulkner-Phillips requests the substitution of Channel 299A[1] for Channel 228A, Butler, Alabama, and modification of the license for Station WQGL and substitution of Channel 227A for Channel 288A, Waynesboro, Mississippi, and modification of the license for Station WABO. Faulkner-Phillips has agreed to reimburse the licensees of Station WQGL and Station WABO for reasonable expenses for this shift. The fourth petitioner, Wolff Broadcasting Corporation ("Wolff Broadcasting"), permittee of Station WIJK-FM, Evergreen, Alabama, proposes the substitution of Channel 227C1 for Channel 227C2 and modification of its construction permit (BPH-890117IB) to specify the higher class channel (RM-7754).

2. An analysis of the above proposals reveals that they cannot all be accommodated since they are separated by less than the required distances specified in Section 73.207 of the Commission's Rules.[2] Faulkner-Phillips' proposed Waynesboro channel substitution is mutually exclusive with Butler Broadcasting's proposed Butler upgrade and Wolff Broadcasting's proposed Evergreen upgrade. Cotton Valley's proposed Bay Springs channel substitution is mutually exclusive with Pearce's proposed Ellisville channel allotment.

3. Channel 228C2 can be substituted for Channel 228A at Butler, Alabama,[3] and the license for Station WQGL modified accordingly, in compliance with the Commission's spacing requirements, provided Channel 232A is substituted for Channel 228A, Bay Springs, Mississippi. Channel 232A can be allotted to Bay Springs at the current site for Station WIZK-FM.[4] Channel 232C2 can be allotted to Ellisville, Mississippi, in compliance with the spacing requirements without a site restriction.[5] Channel 288C3 can be substituted for Channel 288A, Bay Minette, Alabama, and the license for Station WMML-FM modified accordingly.[6] To accommodate the upgrade at Bay Minette, it is necessary to substitute Channel 299A for Channel 228A, Station WQGL, Butler, Alabama,[7] and substitute Channel 227A for Channel 288A, Station WABO, Waynesboro, Mississippi,[8] and to modify the license for each station accordingly. Channel 227C1 can be substituted for Channel 227C2, Evergreen, Alabama, in compliance with the Commission's spacing requirements.[9] We shall propose to modify the construction permit for Station WIJK-FM, Evergreen, to specify operation on Channel 227C1.

4. We believe the public interest would be served by seeking comments on these proposals. We note that the proposal for Ellisville will provide a second local FM service[10] while adoption of the other proposals will result in the provision of expanded service in the other commu-

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[1] Faulkner-Phillips requested the substitution of Channel 296A for Channel 228A, Butler. However, to avoid a short spacing to Station WLSM-FM, Channel 296C3, Louisville, Mississippi, we have instead proposed the substitution of Channel 299A at Butler.

[2] The Butler Broadcasting/Cotton Valley, Pearce and Faulkner-Phillips proposals may be examined pursuant to the rules governing minimum distance separation requirements in effect prior to October 2, 1989, since the petitions were filed before that date.

[3] The coordinates for Channel 228C2, Butler, are 32-08-10 and 88-15-00.

[4] The coordinates for Channel 232A, Bay Springs, are 31-59-00 and 89-13-50.

[5] The coordinates for Channel 232C2 at Ellisville are 31-36-12 and 89-12-00.

[6] The coordinates for Channel 288C3, Bay Minette, are 30-58-34 and 87-58-32.

[7] The coordinates for Channel 299A, Butler, are 32-06-02 and 88-14-07.

[8] The coordinates for Channel 227A, Waynesboro, are 31-40-48 and 88-40-34.

[9] The coordinates for Channel 227C1, Evergreen, are 31-14-48 and 86-48-32.

[10] The construction permit held by South Jones Broadcasters Corporation (BP850605AB), Ellisville, for Station WEMK-AM expired on December 3, 1987, and has been cancelled by the Commission.

nities. In this regard, we are providing the proponents with an opportunity to demonstrate why their respective proposals should be preferred. The burden, therefore, is on proponents of conflicting modification proposals to demonstrate the need for an increase in existing service which the Commission could consider in its comparative evaluation. The parties should be guided by the criteria set forth in the *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

5. As requested, we shall propose to modify the license of Station WQGL, Butler, Alabama, to specify operation on Channel 228C2 in lieu of Channel 228A, the license of Station WMML-FM, Bay Minette, Alabama, to specify operation on Channel 288C3 in lieu of Channel 288A and the construction permit of Station WIJK-FM, Evergreen, Alabama, to specify operation on Channel 227C1 in lieu of Channel 227C2, in accordance with Section 1.420(g) of the Rules. Since the proposed modifications of licenses considered herein all involve proposals to upgrade on adjacent channels, we shall do so without requiring a demonstration of the availability of an additional equivalent channel or entertain other expressions of interest in the channel at the community proposed. The license for Station WIZK, Bay Springs, Mississippi, can be modified to specify operation on Channel 228A in lieu of Channel 232A in accordance with the Commission's Rules. We will issue an *Order to Show Cause* to the licensees of Station WQGL, Channel 228A, Butler, Alabama, and Station WABO, Channel 288A, Waynesboro, Mississippi, to show why their licenses should not be modified as proposed herein. Because the licensee of Station WIZK, Channel 228A, Bay Springs, Mississippi, has consented to the proposed substitution, we shall not issue an *Order to Show Cause* to that licensee.

6. In view of the above, the Commission believes it is appropriate to solicit comments on the alternate proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

OPTION I

	Channel No.	
Community	Present	Proposed
Butler, Alabama	228A	228C2
Bay Springs, Mississippi	228A	232A
Evergreen, Alabama	227C2	227C1

OPTION II

Ellisville, Mississippi	272A	232C2, 272A[11]
Bay Minette, Alabama	288A, 293A	288C3, 293A
Butler, Alabama	228A	299A
Waynesboro, Mississippi	288A	227A

OPTION III

Ellisville, Mississippi	272A	232C2, 272A
Evergreen, Alabama	227C2	227C1

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, that Butler Broadcasting Corporation, licensee of Station WQGL, Butler, Alabama, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 299A in lieu of Channel 228A and Martin Broadcasting Company, licensee of Station WABO, Waynesboro, Mississippi, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 227A in lieu of Channel 288A.

8. Pursuant to Section 1.87 of the Commission's Rules, Butler Broadcasting Corporation and/or Martin Broadcasting Company may, not later than **December 16, 1991,** file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the Order to Show Cause. The Commission may call on Butler Broadcasting Corporation and/or Martin Broadcasting Company to furnish additional information. If Butler Broadcasting Corporation and/or Martin Broadcasting Company raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Butler Broadcasting Corporation and/or Martin Broadcasting Company will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary Shall Send by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the following:

Butler Broadcasting Corporation Station WQGL Box 566 Butler, Alabama 36904	Martin Broadcasting Company Station WABO Box 507 Waynesboro, Mississippi 39367

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **December 16, 1991,** and reply comments on or before **December 31, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or, as follows:

[11] Channel 272A was upgraded to Channel 273C2 in MM Docket 86-251. *See* 2 FCC Rcd 1651 (1987).

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Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for Butler Broadcasting and Cotton Valley Broadcasting)

G. Dean Pearce
1169 Northwood Lake
Northport, Alabama 35476
(petitioner for Ch. 232C2, Ellisville, Mississippi)

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901 - 15th Street, N.W., Suite 700
Washington, D.C. 20005-2301
(Counsel for Faulkner-Phillips Media, Inc.)

Dennis J. Kelly
Cordon & Kelly
1920 N Street, N.W.
Washington, D.C. 20036
(Counsel for Wolff Broadcasting Corporation)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-187

In the Matter of

Amendment of Section 73.202(b), RM-7698
Table of Allotments,
FM Broadcast Stations.
(Hamilton and Glen Rose, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1991; Released: October 24, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Fletcher Broadcasting, Inc. ("petitioner"), permittee of Station KCLW-FM, Hamilton, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 3756 (1991), proposing the reallotment of Channel 221A at Hamilton to a Class C2 channel and modification of its construction permit to specify Glen Rose as its community of license. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. Channel 221C2 lies within the Grade B contour of Station KCEN-TV, Channel 6, Temple, Texas. Therefore, petitioner was requested to furnish a preclusion study demonstrating the impact of a Channel 221C2 allotment at Glen Rose on the future availability of Class A, C3, C2, C1 and C noncommercial educational allotments on Channels 218, 219 and 220 within the affected area. Petitioner submitted a preclusion study for the proposed operation of Station KCLW-FM on Channel 221C2 at Glen Rose. According to petitioner, preclusion will be caused on Channels 220C2, 220C3, 220A, 218C3 and 218A. However, petitioner states the precluded areas contain a total of 12 communities with populations over 1,000 and that eight of these communities either currently receive or can be assigned noncommercial educational service. Petitioner claims that with proper engineering, service can be provided to the remaining areas and that the preclusive effect of this proposal is not significant.

3. Based on our analysis of the petitioner's preclusion study, we find that there will be no significant impact on noncommercial educational service development in the region if Channel 221C2 is allotted to Glen Rose. Therefore, we believe the public interest will be served by allotting Channel 221C2 at Glen Rose in lieu of Channel 221A at Hamilton, since it would provide Glen Rose with its first local aural transmission service. Hamilton will retain an aural transmission service. Channel 221C2 can be allotted to Glen Rose in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.5 kilometers (15.2 miles) southwest to accommodate petitioner's desired transmitter site.[1] In accordance with Section 1.420(i) of the Commission's Rules, we will also modify petitioner's construction permit to specify operation on Channel 221C2 at Glen Rose, Texas.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Glen Rose, Texas	221C2

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Fletcher Broadcasting, Inc., for Station KCLW-FM, IS MODIFIED to specify operation on Channel 221C2 at Glen Rose, Texas, in lieu of Channel 221A at Hamilton, Texas, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Fletcher Broadcasting, Inc., permittee of Station KCLW-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 221C2 at Glen Rose are North Latitude 32-07-25 and West Longitude 97-58-49.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-302

In the Matter of

Amendment of Section 73.202(b), RM-7826
Table of Allotments,
FM Broadcast Stations.
(Fountain, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1991; Released: October 24, 1991

Comment Date: December 16, 1991
Reply Comment Date: December 31, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Hubbard Broadcasting, Inc. ("petitioner"), permittee of Channel 241A at Fountain, Colorado (BPH-891006MP), seeking the substitution of Channel 241C3 for Channel 241A and modification of its construction permit accordingly to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 241C3 if it is allotted to Fountain, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 241C3 for Channel 241A at Fountain, Colorado, since it could provide an enhanced service to the community. Channel 241C3 can be allotted to Fountain at the petitioner's currently authorized site,[1] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[2]

3. We shall propose to modify the construction permit issued to the petitioner for the new station at Fountain, Colorado. Since the modification request complies with the provisions of Section 1.420(g) of the Commission's Rules, we will not entertain competing expressions of interest in the use of Channel 241C3 at Fountain, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. Accordingly, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Fountain, Colorado	241A	241C3

5. IT IS ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KXFM(FM), Colorado Springs, Colorado, as follows: Citadel Associates Limited Partnership, Radio Station KKFM(FM), 411 Lakewood Circle, Colorado Springs, CO 80910.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 16, 1991,** and reply comments on or before **December 31, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Nathanial F. Emmons, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons & Topel, P.C.
1000 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and com-

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[1] Coordinates for requested Channel 241C3 at Fountain are 38-44-47 and 104-51-37.

[2] Requested Channel 241C3 at Fountain is short-spaced to Station KKFM(FM), Channel 243C, Colorado Springs, Colorado, at coordinates 38-44-36 and 104-51-44, and thus is dependent upon Station KKFM(FM) relocating to Channel 251C pursuant to the directive set forth in the *Report and Order* in MM Docket No. 81-819. (The original allotment of Channel 241A at Fountain, which occurred in MM Docket No. 88-46, was also made based upon the substitution of Channel 251C for Channel 243C at Colorado Springs. *See* 4 FCC Rcd 5672 (1989).) Therefore, in the event Channel 241C3 is ultimately allotted to Fountain, the issuance of a license for the facility may be withheld until the license grant occurs at Colorado Springs. The licensee of Station KKFM(FM) will be served with a copy of this *Notice*. Additionally, the required minimum distance separation is met to Station KGLL(FM), Channel 241C1, Greely, Colorado, at coordinates 40-38-08 and 104-49-08, based upon the provisions of Section 73.208(c)(8) of the Commission's Rules.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-437

In the Matter of

Amendment of Section 73.202(b),	RM-6367
Table of Allotments,	RM-6596
FM Broadcast Stations.	
(Belfry and Harold, Kentucky)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1991; Released: October 24, 1991

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Paul R. Gearheart, tr/as Inter-Mountain Broadcasting Company ("Inter-Mountain"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 5574 (1988), proposing the allotment of Channel 285A to Harold, Kentucky, as that community's first local aural transmission service. Petitioner filed comments stating its intention to apply for the channel. Ed Billips, d/b/a Belfry Broadcasting ("BB"), filed comments and a counterproposal seeking the allotment of Channel 285A to Belfry, Kentucky, as that community's first local FM service.[2] Floyd County Broadcasting Company, Inc. ("Floyd"), licensee of Station WMDJ, Martin, Kentucky, filed comments, and Inter-Mountain filed reply comments and a supplement. In response to the counterproposal Inter-Mountain, Floyd and BB filed reply comments.[3]

2. Inter-Mountain states that Harold, a community of 350 persons, presently has no local transmission service. It states that it will file an application for the Harold channel, if allotted.

3. BB seeks the allotment of Channel 285A to Belfry, Kentucky, as that community's first local transmission service. BB states that the community is listed in the *Rand McNally Road Atlas* with a population of 900 persons, whereas Harold has a population of 350 persons. BB states that Belfry has its own post office and zip code. BB argues that Belfry is the home of several Pike County government offices, including the Pike County Sheriff's Department, the Pike County Court Clerk, the Pike County Health Department, a Senior Citizens Center, and the Pike County Magistrate. In addition, BB states that there is a library in Belfry controlled by the Pike County Library Board, and the county's largest high school. Three civic clubs that identify themselves with Belfry and three churches are located in the community. Belfry residents receive electricity from Kentucky Power Company, natural gas from Belfry Gas, and water from Mountain Water District. Belfry has a community owned cable television system which was established by the citizens of Belfry to provide cable service exclusively for the citizens of the community. BB states that it will apply for the channel, if allotted.

4. Floyd opposes the allotment of Channel 285A to Harold, Kentucky. Floyd contends that Harold does not qualify for community status under the standards developed by the Commission in allotment proceedings. Floyd submits a report from a Floyd County resident attesting to the claim that Harold is not a community. The report states that Harold is neither incorporated nor listed as a community in the U.S. Census, has no legal or definable boundaries, does not have a government of its own and does not have any governmental services such as police, fire protection, garbage collection, water, electricity, or sewerage. Floyd states that Harold's telephone exchange and area code covers several rural communities. It claims that Harold has no recreational facilities and no library. While there is a church in Harold, Floyd alleges that the church's membership encompasses other areas. Floyd claims that Harold has no social, religious, political or civic organizations, and lacks indicia typical of a community such as a newspaper, a city hall or a hospital. Floyd goes on to state that while the 1985 and the 1987 editions of *Rand McNally Road Atlas* list Harold, the Commission has held that maps containing a designation of an alleged community only signify a geographical location and do not establish that there is in fact a community, citing *Vimville, Mississippi*, 55 R.R. 2d 256 (1983).

5. Inter-Mountain filed comments in response to the counterproposal, stating that Floyd's arguments are without merit. Inter-Mountain states that Harold is growing at a rapid rate. While the 1985 edition of the *Rand McNally Road Atlas* showed the community to have a population of 350 persons, the 1987 *Rand McNally Commercial Atlas* states that Harold has grown to 600 persons. Inter-Mountain contends that the community of Harold and its streets are shown on a United States Geological Survey Quad Map. Harold is also shown on aeronautical sectional maps published by the Department of Commerce. InterMountain submits a number of letters from local businesspeople, describing the community, and a number of photographs which identify the various institutions in Harold. It provides a list of some 50 businesses in Harold. InterMountain maintains that Harold has its own post office, elementary school, four churches, and several small businesses.

6. Inter-Mountain opposes the allotment of a channel to Belfry. It claims that Belfry is situated in a remote, almost unpopulated portion of Pike County, about 3.5 miles south of Williamson, West Virginia. It argues that Belfry is currently served by two Class B FM stations licensed to

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[1] The community of Belfry has been added to the caption.

[2] Public Notice of the counterproposal was given December 17, 1988, Report No. 1761 (RM-6596).

[3] Inter-Mountain filed a motion for leave to file additional comments and additional comments. Floyd filed a motion to strike, and Inter-Mountain filed an opposition to Floyd's motion. The Commission's Rules do not provide for the filing of comments after the reply comment period unless specifically requested by the Commission. *See* Commission Rule 1.415(d). Therefore, we will not consider these comments.

Williamson and Logan, West Virginia.[4] In addition, Inter-Mountain supplemented its reply comments with an engineering report stating that, due to the site restriction for any station at Belfry, no transmitter site exists which can be used to serve Belfry without unacceptable shadowing. The statement alleges that a tower of 1,000 feet in height would not be enough to overcome severe diffraction losses at Belfry.

7. In comments in response to the counterproposal, Inter-Mountain restates that Harold is growing at a rapid rate, has its own post office and elementary school, four churches, and several small businesses. Inter-Mountain states that the allotment of Channel 285A to Harold would better serve the statutory mandate to allot frequencies in a fair, efficient and equitable manner than would the proposed allotment to the isolated community of Belfry.

8. In its responsive comments, Floyd reasserts that Harold is not a community for allotment purposes. Floyd argues that except for a claim that Harold has more than one church, Inter-Mountain does not dispute Floyd's statements opposing the allotment. Floyd claims that Harold does not have its own post office, but instead has a facility that serves several rural areas. The elementary school is attended primarily by students who live outside of Harold. Floyd also disputes Harold has four churches, arguing that only one church is actually in Harold. Floyd claims that Harold has 18 businesses, not the 50 alleged by Inter-Mountain.

9. Floyd goes on to state that even if the Commission were to conclude that Harold is a community for allotment purposes, Belfry should receive the allotment. Floyd states that Belfry is listed in the *Rand McNally Road Atlas* as having a population of 900 persons, whereas Harold has a population of 350 persons. Belfry, unlike Harold, is the site of several Pike County governmental offices, a public library and the county's largest high school. Moreover, in contrast to Harold, Belfry has three civic clubs and community owned cable television system.

10. In reply comments BB reasserts that even if Harold is a community for allotment purposes, Belfry should receive the allotment. BB argues that Belfry has government offices, a library, a high school, civic clubs, its own emergency services, and more churches and businesses. In response to Inter-Mountain's contention that no transmitter site exists which can be used to serve Belfry without unacceptable shadowing, BB contends that a site has been located for Channel 285A which would comply with the separation requirements of the Commission's rules.[5] BB also argues that there are a number of sites available for applicants willing to use directional antennas.

11. We have reviewed the pleadings received in this proceeding. We find that there is no site available for Channel 285A at Belfry that would permit operation of a station in compliance with our rules. Our engineering analyses indicate that at each of Belfry's requested sites [6] Channel 285A would not provide Belfry with 70 dBu city grade coverage. Neither site would provide line-of-sight coverage to the community and be free of shadowing problems, as required by Section 73.315(b). An allotment will not be made in the absence of reasonable assurance that a suitable site area exists from which a station can operate in accordance with Commission rules. *See Creswell, Oregon*, 4 FCC Rcd 7040 (1989). Our analysis also indicates that no sites are available for Channel 285A at Belfry that would fully comply with our rules, and no alternate channels are available. Therefore, we will not allot a channel to Belfry.

12. We find that Harold is a community for allotment purposes. Harold is listed in the 1985 edition of the *Rand McNally Road Atlas* as a community with a population of 350 persons, and in the 1991 *Rand McNally Commercial Atlas* shows Harold with a population of 600 persons. Harold has a post office, elementary school, at least one church, and several small businesses. Inter-Mountain submitted a number of letters from businesspeople, describing the community and a number of photographs which identify the various institutions which lie within the community of Harold. Although, Floyd maintains that Harold has no local government and provides no municipal services, the Commission has stated that a municipality need not provide every public service such as police, fire protection, water and electricity services on its own in order to merit community status. Similarly, the absence of a newspaper or a bank is not fatal to community status. *See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments (Semora, North Carolina)*, 5 FCC Rcd 934, 935 (1990). Therefore we find that Harold is a community for allotment purposes.

13. We believe the public interest would be served by allotting Channel 285A to Harold, Kentucky, as that community's first local service. We will allot Channel 285A to Harold in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.2 kilometers (6.9 miles) east [7] of the community.

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

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[4] Inter-Mountain proposes that the Commission could allot Channel 285A as a hyphenated allotment to Harold-Betsy Layne, Kentucky. We will not consider this alternate proposal. This proposal is procedurally untimely, as it was advanced after the date for comments to be filed in this proceeding. *See* Commission Rule 1.420(d) and paragraph 3(a) of the Appendix to the *Notice*. In addition, even if timely filed, Inter-Mountain has not provided sufficient evidence that Harold and Betsy Layne should be considered as one community for allotment purposes, other than the fact that the communities are located within one mile of each other. *See Report and Order, Eagle Nest-Angel Fire, New Mexico*, 3 FCC Rcd 2520 (1988).

[5] This site is at coordinates 37-31-42 and 82-18-44.

[6] An engineering analysis has been performed for Channel 285A at coordinates 37-31-35 and 82-19-20 and 37-31-42 and 82-18-44.

[7] The coordinates for Channel 285A at Harold are North Latitude 37-31-45 and West Longitude 82-30-20. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WXKZ(FM), Channel 288A, Prestonsburg, Kentucky. *See* 47 C.F.R. § 73.213(c). We will allot Channel 285A at this site in lieu of the site proposed in the *Notice*, 37-30-23 and 82-31-11, as our analysis indicates that the latter site may present line of sight difficulties.

City	Channel No.
Harold, Kentucky	285A

15. The window period for filing applications will open on **December 10, 1991,** and close on **January 9, 1992.**

16. IT IS FURTHER ORDERED, that the counterproposal of Ed Billips, d/b/a Belfry Broadcasting (RM-6596), IS DENIED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-105

In the Matter of

Amendment of Section 73.202(b), RM-7677
Table of Allotments,
FM Broadcast Stations.
(Socastee, South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 9, 1991; Released: October 24, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Puritan Radiocasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2071 (1991), proposing the substitution of Channel 258C3 for Channel 258A at Socastee, South Carolina, and the modification of Station WMYB's construction permit to specify operation on the higher class channel. Petitioner filed comments stating its intention to apply for Channel 258C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 258C3 for Channel 258A at Socastee since it could provide the community with a wide coverage area FM service and enable Station WMYB to expand its service area. As proposed, we will modify Station WMYB's construction permit to specify operation on Channel 258C3 in lieu of its present Channel 258A. *See* Section 1.420(g) of the Commission's Rules. Channel 258C3 can be allotted to Socastee in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.4 kilometers (6.5 miles) east to avoid a short-spacing to the proposed allotment of Channel 257C3 at Kingstree, South Carolina (RM-6826) and to accommodate petitioner's desired transmitter site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Socastee, South Carolina	258C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Puritan Radiocasting Company for Station WMYB, Socastee, South Carolina, IS MODIFIED to specify operation on Channel 258C3, in lieu of Channel 258A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Puritan Radiocasting Company, permittee of Station WMYB, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 258C3 at Socastee are North Latitude 33-42-20 and West Longitude 78-53-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-221

In the Matter of

Review of the Policy Implications
of the Changing Video Marketplace

ORDER GRANTING EXTENSION OF TIME

Adopted: October 10, 1991; Released: October 11, 1991

Comment Date: November 21, 1991
Reply Comment Date: December 19, 1991

By the Chief, Mass Media Bureau:

1. On July 11, 1991, the Commission adopted a *Notice of Inquiry* in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991) (*Notice*), in the above-captioned proceeding in order to seek wide-ranging comments on changes in the state of the video marketplace and the public policy implications that flow from these changes. The inquiry sought comment on several apparent trends, including the increasing competition in, and fragmentation of, the video marketplace; technological advances such as digital signal compression techniques; the ability of some competitors to rely on revenue from direct viewer payment instead of, or in addition to, advertising; and the rapid increase in the availability of national sources of programming. The Commission established a deadline of October 22, 1991, for filing comments and a deadline of November 21, 1991, for filing reply comments.

2. Before the Commission is a motion for extension of time filed by the Motion Picture Association of America and the Association of Independent Television Stations (MPAA/INTV) on October 3, 1991. The motion requests an extension of time to file comments until November 21, 1991, and reply comments until December 19, 1991. Both motions are unopposed.

3. MPAA/INTV requests an extension to permit full evaluation of the broad, complex issues raised in the *Notice*. While MPAA and INTV member companies have been reviewing these issues, they will not have sufficient time before the current due date for comments to assemble their members and analyze the issues in depth.

4. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. In order to evaluate current industry circumstances and apparent trends in the video marketplace, however, we expect interested parties to provide complex economic and technical evidence and analyses on a broad range of issues. It appears reasonable to provide parties with an additional brief period of time to compile and analyze the data and determine the apparent trends and their implications for Commission policies. Therefore, we will grant the motion and extend the deadline for filing initial comments to November 21, 1991, and the deadline for filing replies to December 19, 1991.

5. Accordingly, IT IS ORDERED that the Motion for Extension of Time filed by the Motion Picture Association of America and the Association of Independent Television Stations IS GRANTED.

6. IT IS THEREFORE ORDERED that the time for filing comments and reply comments in this proceeding ARE EXTENDED to **November 21, 1991,** and **December 19, 1991,** respectively.

7. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

8. For further information concerning this proceeding, contact Beverly McKittrick, Policy and Rules Division, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Acceptance of 929-930 MHz
One-way Paging Applications

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

ORDER

Adopted: October 4, 1991; Released: October 7, 1991

By the Chief, Private Radio Bureau:

1. Effective 12:01 A.M., October 5, 1991, no new applications for one-way paging licenses in the 929-930 MHz band will be accepted for filing by the Federal Communications Commission. The paging frequencies affected by this *Order* are identified by Section 90.494(a) of the Rules, 47 C.F.R § 90.494(a).[1] We will continue to accept 900 MHz one-way paging applications received in a condition acceptable for filing on or before October 4, 1991.[2]

2. Our records indicate that on a nationwide basis, there are relatively few licensees operating on 900 MHz one-way paging channels. The Bureau is currently studying alternatives for managing 900 MHz paging spectrum that would encourage greater use of these channels and enhance service quality. To retain the flexibility to pursue a variety of regulatory options, the Bureau finds that the public interest will best be served by freezing all further licensing on these channels at this time.[3]

3. This action is taken pursuant to the provisions of Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331.[4] This freeze on Commission acceptance of applications for one-way paging channels in the 900 MHz band will remain in full force and effect until such time as additional action is taken to resume acceptance of these applications.

4. For further information, contact the Consumer Assistance Branch, Licensing Division, Private Radio Bureau, (717) 337-1212.

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[1] The one-way paging assignments are those identified in the Table in Section 90.494(a).

[2] We will continue to accept applications to modify existing licensed facilities.

[3] The imposition of this freeze on the acceptance of 900 MHz one-way paging applications is procedural in nature. It is, therefore, not subject to the notice and comment provisions of the Administrative Procedure Act (APA). *See Kessler v. FCC*, 326 F. 2d 673 (D.C. Cir. 1963). Further, because this freeze is procedural in nature, it is not subject to the 30-day effective date provisions of the APA. In any event, good cause exists to put this freeze into effect immediately because advance notification that the Bureau is considering licensing alternatives for this band would likely prompt the filing of numerous applications and such filings could defeat the administrative purpose of the freeze.

[4] The Commission has broad discretion to freeze acceptance of new applications. *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963). This action is akin to and consistent with prior actions taken by the Commission and by delegated authority to freeze acceptance of applications in certain radio services where the public interest, convenience and necessity warrant such action. *See, e.g., Order*, 5 FCC Rcd 2136 (1990) (action by the Commission restricting acceptance of AM broadcast applications); *Public Notice*, 1 FCC Rcd 1264 (1986) (action by the Commission placing a temporary freeze on acceptance of AM daytime broadcast applications); *Public Notice*, Report No. 1207 (December 6, 1983) (action by the Private Radio Bureau suspending filing of 2.5 GHz applications).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 9, 1991

COMMENTS INVITED ON VIRGINIA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Virginia (Region 42).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **November 18, 1991** and reply comments on or before **December 3, 1991.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.) Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 91-300 Virginia-Public Safety Region 42.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COMMUNITY SERVICE TELECASTERS, INC. (Assignor) File No. BAPCT-880921KE

and

AGAPE COASTAL TELEVISION, INC. (Assignee)

For Assignment of Construction Permit for Unbuilt Station WGTJ(TV), Channel 38, Greenville, North Carolina

COMMUNITY SERVICE TELECASTERS, INC. File No. BMPCT-880921KF

For Modification of Facilities of Station WGTJ(TV), Greenville, North Carolina

COMMUNITY SERVICE TELECASTERS, INC. File No. BMPCT-890612KE

For Extension of Time to Construct WGTJ(TV), Greenville, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1991; Released: October 25, 1991

By the Commission:

INTRODUCTION

1. On December 28, 1990, the Chief, Video Services Division, acting pursuant to delegated authority, denied the application of Community Service Telecasters, Inc. ("Community") for extension of time to construct television station WGTJ, Channel 38, Greenville, North Carolina; deleted the WGTJ call sign; rescinded the station's authorization; dismissed, as moot, Community's application seeking to modify the WGTJ facilities; and dismissed, as moot, Community's application proposing to assign the WGTJ construction permit to Agape Coastal Television, Inc. ("Agape") (Community and Agape hereinafter referred to collectively as the "Applicants"). Before us for consideration is a Petition for Reconsideration filed by Community and an Application for Review filed by Agape, both of which request that the staff's action be reversed and that the applications set out in the caption be granted.[1] Diversified Communications, Inc. ("Diversified") and WITN-TV, Inc. ("WITN-TV") (collectively the "Petitioners"),[2] which had each objected to the applications, now jointly oppose these pleadings seeking reconsideration and review. For the reasons discussed below, we deny Community's Petition for Reconsideration and Agape's Application for Review.

BACKGROUND

2. On April 26, 1985, Community filed its application for a construction permit to build a new television station, WGTJ, on UHF Channel 38 in Greenville, North Carolina. In due course, the staff designated that and other mutually exclusive applications for comparative hearing. On November 3, 1986, following a settlement among the competing applicants, the Administrative Law Judge granted Community's application. On June 22, 1987, the Channel 38 authorization was issued. The WGTJ construction permit specified a transmitter site near Shelmerdine, North Carolina, and an expiration date of June 22, 1989. Community had anticipated building the first independent television station in the Greenville-New Bern-Washington, North Carolina television market.[3] However, it appeared to Community that these hopes were diminished following the June 1988 release of a decision by the United States Court of Appeals for the D.C. Circuit affirming the Commission's action allotting VHF Channel 8 to neighboring Morehead City, North Carolina, (Greenville and Morehead City, while part of the same market, are approximately 75 miles apart). While Community's construction permit application was still pending, the Commission allotted Channel 8 to Morehead City in September 1985 rejecting claims that the allotment would cause excessive adjacent-channel interference to operations on Channel 7 in Washington, North Carolina, and Channel 9 in Greenville.[4] In early 1986, about six months before the WGTJ construction permit was granted, Local Television Associates, Inc. ("LTA"), and six other competing applicants filed their respective applications for the construction permit to build a station on Channel 8. Following a settlement among the remaining competing applicants, LTA was granted the construction permit for station WFXI(TV) on April 15, 1987, two months before the WGTJ authorization was finally issued. The WFXI authorization was issued on April 7, 1988. LTA thereafter constructed the proposed facilities and placed WFXI on the air in November 1989 as an affiliate of the Fox network. In the mean-

[1] In the interest of efficiency, we shall, in our discretion, treat Community's Petition for Reconsideration as an Application for Review, but without prejudice to our consideration of the matter raised in ¶ 6 below.

[2] Diversified is the licensee of television station WCTI-TV, Channel 12, New Bern, North Carolina, and WITN-TV, Inc. is the licensee of television station WITN-TV, Channel 7, Washington, North Carolina.

[3] At the time, the market was ranked as the 106th largest and was being served by WNCT-TV (Channel 9, CBS), Greenville; WCTI-TV (Channel 12, ABC), New Berne; WITN-TV (Channel 7, NBC), Washington; and by three noncommercial educational stations.

[4] *See Television Broadcast Station in Morehead City, NC*, 50 Fed. Reg. 33,546 (1985), *recon. denied Memorandum Opinion and Order*, MM Docket No. 84-790 (July 8, 1986), *review denied* 2 FCC Rcd 4146 (1987), *aff'd sub nom. WITN-TV, Inc. v. FCC*, 849 F.2d 1521 (D.C. Cir. 1988).

time, with the emergence of this new VHF television station in the market, Community had deemed WGTJ worthless as a stand-alone independent. Instead of attempting to compete with WFXI and the other stations in the market by building WGTJ as initially proposed, Community agreed with the principals of LTA to join forces and operate WGTJ as a satellite station of WFXI.

3. On September 21, 1988, the Applicants filed their application to assign the WGTJ construction permit from Community to Agape. Community simultaneously filed its application to modify the WGTJ construction permit proposing a new transmitter site near Grifton, North Carolina (Grifton site).[5] Agape and LTA have substantial ownership in common and the predicted Grade B contours of WGTJ and WFXI overlap in a manner prohibited by the multiple ownership rules.[6] Therefore, the Applicants sought the Commission's approval of their proposal to operate WGTJ as a satellite station pursuant to the Note 5 exception of the multiple ownership rules.[7] In addition, pursuant to Section 73.3535 of the Commission's Rules, Community attempted to explain that, although the assignment application was filed in the second half of the specified 24-month construction period, no steps had been taken toward constructing the station because of changed circumstances beyond the control of the permittee.[8] Specifically, as noted above, while it had anticipated building the first independent in the market, Community claimed that the sudden and unforeseen emergence of the new VHF television station, WFXI, in the market rendered the WGTJ construction permit worthless. Community stated that it realized then that it would be unable to construct its independent station as planned. Diversified and WITN-TV filed petitions to deny against the assignment application arguing, among other things, that Community had failed to demonstrate that circumstances beyond its control prevented construction of the station and that the Applicants had not shown that the operation of WGTJ as a satellite would serve the public interest.[9]

4. Because the WGTJ construction permit was set to expire on June 22, 1989, Community filed an application for extension of time to construct (FCC Form 307). Pursuant to Section 73.3534(b) of the Commission's Rules, Community again attempted to justify its failure to take any steps to build the authorized facilities within the required 24-month time period because of reasons beyond its control.[10] Specifically, Community repeated its alleged justification presented in the assignment application and its responsive pleadings regarding the untenable prospect of establishing a UHF station as the second independent station in the market. Community also stated that any progress in constructing the station was prevented by the pendency of the assignment and modification applications filed nine months earlier. In addition, Community outlined Agape's specific plans and the steps already taken toward commencing construction, including the location of a tower site with a usable transmitter building, the execution of an option to purchase this site, continued negotiations with contractors and tower construction companies, and discussions with transmitter and antenna manufacturers.

5. In its December 28, 1990 decision, the staff determined that before the pending assignment and modification applications could be granted, it must decide whether a basis exists for granting the application for extension of time to construct. The staff found that Community had taken no steps toward constructing WGTJ that would justify granting the extension application. According to the staff's evaluation of the record, Community had acquired no equipment, erected no tower, and risked no funds during the time it held the WGTJ authorization. The staff also assessed the reasons advanced by Community for not constructing the station in view of our policy of ensuring good-faith construction efforts on the part of permittees "to expedite service to the public."[11] The staff concluded that the allotment of a new station to Morehead City did not constitute a circumstance beyond the permittee's control justifying its lack of construction. The staff found that Community's decision rested on its own determination of the possible adverse economic effects of the new station. Such economic judgments, the staff held, do no constitute causes beyond the permittee's control, citing *New Orleans Channel 20, Inc.*, 100 FCC 2d 1401 (M. M. Bur. 1985), *rev. denied*, 104 FCC 2d 304, 313 (1986), *aff'd*, 830 F.2d 361 (D.C. Cir. 1987).[12] Therefore, the staff denied Community's extension request, and, since the permittee had nothing left to assign or modify, it dismissed the pending assignment and minor change applications as moot.[13] The Applicants now seek review and reconsideration of the staff's legal and factual conclusions reached in disposing of these applications.

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[5] On June 19, 1990, Community amended its modification application and proposed an alternative transmitter site near Farmville, North Carolina (Farmville site).

[6] *See* 47 C.F.R. § 73.3555(a)(3).

[7] *See* 47 C.F.R. § 73.3555, Note 5.

[8] *See* note 11, *infra*.

[9] WITN-TV also filed informal objections against Community's minor modification application and a modification filed by LTA with respect to WFXI's facilities (BMPCT-880907KF).

[10] *See* note 11, *infra*.

[11] In 1985, we adopted strict criteria for the granting of broadcast applications for extensions of time to construct, applications to modify authorized but unbuilt facilities, and applications to assign or transfer control of unbuilt facilities. *Construction of Broadcast Stations*, 102 FCC 2d 1054 (1985). Specifically, before an extension application can be granted, a permittee must show either that substantial progress has been made in the construction of the station or that reasons clearly beyond its control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and to proceed with construction. *See* 47 C.F.R. §73.3534(b). Similarly, if a permittee finds it necessary to file a modification application or an assignment/transfer application during the second half of the station's specified construction period, the permittee must make a showing of "substantial progress" or "reasons clearly beyond the control of the permittee." *See* 47 C.F.R. § 73.3535(b).

[12] In *New Orleans Channel 20* we affirmed the Mass Media Bureau's denial of the Channel 20 extension request and assignment application after determining, *inter alia*, that the permittee's decision to assign the station, on which no construction had been commenced, was based, not on circumstances beyond its control, but on the permittee's judgement that the impending operations by a second independent UHF television station in the New Orleans market represented formidable competition for Channel 20. 104 FCC 2d at 313.

[13] The staff further noted that even if the assignment application was considered, no basis existed for its approval in that the Applicants had not justified operation of WGTJ as a satellite station. In view of our determination below regarding the extension request, we need not discuss the staff's assessment of the

DISCUSSION

6. The Applicants present three principal arguments as to why the staff's denial of Community's extension should be reversed. First, Community asserts that the transmitter site specified in its original authorization (the Shelmerdine site) is "unacceptable" for constructing WGTJ. Community claims that the loss of this site was a circumstance beyond its control justifying its failure to construct. We note that while Community did not bring this problem to the staff's attention specifically in connection with the WGTJ extension application, the matter was previously mentioned in connection with the Applicants' satellite justification.[14] Although it appears that the staff did not consider Community's site problem in assessing the WGTJ extension application, we do not believe that this asserted reason could have helped Community's case for an extension. In that regard, Community admits that the site problem was not previously disclosed specifically as a factor beyond its control because it had abandoned the Shelmerdine site in favor of the Grifton site. Community also states that it had deemed the problem to be relatively unimportant given the circumstances concerning Community's claimed loss of economic opportunity when WFXI arrived on the scene. In addition, Community says that the problem was not discovered until May 1990, eleven months after the extension application was filed. Thus, based on Community's explanation of this problem as a circumstance beyond its control, we are unable to conclude that a problem discovered only in May 1990 was a bona fide reason that no positive steps were taken to build the station during the permit's specified construction period -- June 22, 1987, to June 22, 1989. If Community had diligently pursued construction instead of focusing its concerns on WFXI, it is likely that the site problem would have been discovered almost immediately. Moreover, Community has failed to demonstrate that its abandonment of the originally authorized site near Shelmerdine in favor of the Grifton site fifteen months into the station's construction period was anything other than a business judgment made independently of the Shelmerdine site's usefulness or availability. *See New Orleans Channel 20*, 104 FCC 2d at 313.

7. The Applicants' second argument is that the staff improperly disregarded the adverse economic impact caused by the impending initiation of service by WFXI. Community states that this unforeseen and uncontrollable change in the economic and competitive situation in the market "was and still is the reason WGTJ cannot be built as a second stand-alone independent in the Greenville/New Berne/Washington market." In this regard, the Applicants argue that the staff's reliance on *New Orleans Channel 20, supra,* was misplaced. Rather, the Applicants maintain that the facts presented to the staff were akin to the economic circumstances facing the permittee in *Horseshoe Bay Centex Broadcasting, Co.*, 5 FCC Rcd 7125 (1990), wherein the permittee of an unbuilt television station in Llano, Texas, blamed the recession in that state as an unforeseeable event beyond its control that foreclosed the permittee from obtaining capital financing needed to construct the station. *Id.* at 7127.

8. We find the *Horseshoe Bay* case inapposite. In that case, while we reaffirmed our general position that the unavailability of funds is not considered a cause beyond the control of the permittee, we found that the permittee had "made diligent and continual attempts to complete construction... only to see its efforts unexpectedly and summarily defeated by the repeated cancellation of *committed* financing from traditional capital sources." *Id.* at 7128 (emphasis in original), citing *L.E.O. Broadcasting, Inc.*, 62 RR 2d 996 (M. M. Bur. 1987). Here, Community's perceived economic woes were caused by the emergence of a competing station into the same market, not a state-wide recession that forced committed financing sources to withdraw. Nowhere did Community indicate that it had lost any particular financing source. Rather, Community stated in its extension request that its financing plan was predicated on operation of the station as the first independent in a market with no VHF independents. Further, the record reveals that, at the time Community obtained the permit for WGTJ, it had notice that another independent station on Channel 8 in Morehead City would very likely be serving much of the same market in competition with its proposed operations in Greenville. Moreover, in *Horseshoe Bay* the permittee actively sought alternative financing and made every effort to get construction underway including: (1) construction of an access road to its transmitter site; (2) grading and leveling of the site; (3) remodeling the studio facilities; and (4) ordering studio, transmitter and antenna equipment. *Id.* at 7128. On the other hand, as the staff found, Community had acquired no equipment, erected no tower and risked no funds toward constructing the station during the initial construction period. The record before us shows that Community simply awaited the result of the court challenge in the Channel 8 allotment proceeding and, in the meantime, sat "in limbo, unable to commit the millions of dollars necessary to construct WGTJ due to the doubts about its economic viability." [15]

9. Third, the Applicants argue that the staff's denial of the extension request is unfair given the treatment of other similarly situated applicants, citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). In support of this argument, Agape lists a number of other unbuilt television stations whose permits had been extended and/or assigned after being outstanding for over twelve months. Agape argues that, in contrast to these listed assignment applications, which were granted during the pendency of the Community/Agape assignment application, its application was singled out for strict application of the Commission's rules without a detailed explanation. The Petitioners respond to Agape's list of applications by correctly pointing out that the Applicants ignore the factual circumstances underlying the grants of the listed assignments and prior extensions.[16]

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satellite proposal.

[14] The originally specified site was apparently incorrectly identified in the original WGTJ construction permit application. The coordinates given for the transmitter site, and approved by the Commission, are on property owned by the Voice of America (VOA). VOA operates a high-power directional shortwave transmission facility from that property.

[15] Application for Extension of Construction Permit, Exhibit 3, p. 2.

[16] The Petitioners indicate, for example, that the permittees of two of the stations listed, WMTT(TV), Cookville, Tennessee, Channel 28 (BMPCT-880906KF) and KIID(TV), Huron, South Dakota, Channel 15 (BPCT-891116KF), had shown substantial progress in constructing their stations -- at WMMT(TV) the

10. Although the Applicants have made no attempt to identify any factual similarities involving Community's extension application and the listed cases, our analysis of the varying circumstances involved in each case leads us to conclude that those permittees/assignors were not similarly situated with the Applicants here. It is clear that in each case cited by the Applicants, one or more of the appropriate grounds for extension of time was established.[17] For example, the permittee for KBTV(TV) (Channel 63), Des Moines, Iowa, (BAPCT-880722KL and BMPCT-880825KI), had demonstrated that it had made substantial progress in constructing the station -- equipment contract executed, fifteen-year tower lease negotiated. Also, the permittee for KMNZ (Channel 62), Oklahoma City, Oklahoma, (BPCT-880606KG) established that it had diligently proceeded with, and was making progress in, building the station. Progress reports for KMNZ indicated that Spanish-language programming had been obtained, equipment had been ordered and the permittee was actively negotiating for alternative sites.[18] Additionally, the permittees for a number of the listed stations had experienced major difficulties and delays in obtaining Federal Aviation Administration (FAA) and/or local zoning approval for their tower sites (recognized circumstances beyond a permittee's control under Sections 73.3534(b)(3) and 73.3535(b)(3)) or made diligent efforts to overcome other adverse circumstances.[19] Of the other stations listed, construction was complete and program tests were underway when the applications in question were granted (Sections 73.3534(b)(1) and 73.3535(b)(1)), or the authorizations have since been cancelled and their records purged from our files. Accordingly, based on the foregoing, we find that the staff's decision to deny Community's extension request was consistent with Commission precedent.

OTHER MATTERS

11. The Applicants raise other arguments which we briefly consider. The Applicants contend that the staff ignored the most direct reason for the failure of the station to be constructed -- the pendency of the assignment and modification applications. The Applicants also allege that the staff had misunderstood "the permittee's plans" and how the promised construction of the station by Agape as a satellite will benefit the public interest. However, we find that neither the pendency of the assignment and modification applications nor the firm commitments of the assignee to build the station can overcome the fact that Community took no steps to construct the station or to solve its problems before these applications were filed.[20] We have often said that the mere filing of an assignment application does not entitle the permittee to a grant of its extension application. *See, e.g., Rappaport Communications, Inc.*, 2 FCC Rcd 175 (1987), and *New Orleans Channel 20*, 104 FCC 2d at 314. Furthermore, when we amended our rules in 1985 to establish stricter guidelines for the granting of broadcast applications for extensions of time to construct, *Construction of Broadcast Stations*, 102 FCC 2d 1054 (1985), we deleted that part of Section 73.3534 of the Rules that had permitted grants of extension applications upon a showing of "other matters," such as the pendency of an assignment application and the assignee's ability to quickly construct the station. *See also Community Telecasters of Cleveland, Inc*, 58 FCC 2d 1296, 1303 (Rev. Bd. 1976) (even under the old rule, the permittee's extension of time request filed for the purpose of assigning the permit and recovering its expenses does not warrant grant of an extension).

12. The Applicants also aver that the staff was incorrect in concluding that Community "has risked no funds." In this connection, Community lists a total of $145,443.53 as having been spent trying to put WGTJ on the air. We note that, of this total, $75,000 represents the amount paid to a competing applicant in the settlement of the Channel 38 comparative proceeding. We find that the payment of this amount to *obtain* the construction permit

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permittee had commenced initial program tests and filed an application for a license to cover the permit; at KIID(TV) all necessary studio and other equipment had been delivered and installation had commenced.

[17] *See* 47 C.F.R. §§ 73.3534(b), 73.3535(b).

[18] *See also Benko Broadcasting Company*, 5 FCC Rcd 1301 (Video Services 1990) (part of tower erected, transmitter ordered, bad winter weather caused delays); *Southwest MultiMedia Corporation*, (M. M. Bur., released September 21, 1990) (reconsideration granted where tower leases terminated by lessors, other lease negotiated, and transmitter ordered); *Kathleen Baily d/b/a Capital Foothill Broadcasters*, 4 FCC Rcd 1429 (1989) (in first year of construction period, permittee attempted to secure a network affiliation; contacted various equipment suppliers, which later became unwilling to provide customary equipment leases; diligently pursued alternative programming and financing sources; examined options of scaling down operations and delivering specialized programming or moving the station's antenna site to reach a larger market; expended almost $50,000 for broadcast engineering consultants, office space, and the hiring of an experienced television broadcaster to develop station's staffing plans).

[19] For example: KNMT(TV) (formerly KTDZ-TV) (Channel 24), Portland, Oregon (BAPCT-871218KH) (tower location subject of very protracted land use litigation); KNVO(TV) (formerly KYBJ) (Channel 48), McAllen, Texas (BAPCT-900910KK, BMPCT-900828KE) (long delay in obtaining FAA approval of a new site on which tower base and guy anchors staked, road constructed, and equipment on hand); KVBM-TV (Channel 45), Minneapolis, Minnesota (BAPCT-880817KF) (FAA and local zoning approval delayed, permittee investigated over 40 potential alternative sites); WBSV-TV (Channel 62), Venice, Florida (BAPCT-890317KH) (local government imposed moratorium on the construction of new tall towers following aircraft collision with another tower in the area); WBUY(TV) (Channel 40), Holly Springs, Mississippi, (BAPCT-890503KE, BMPCT-890601KE) and WPGD(TV), Hendersonville, Tennessee, (BAPCT-890504KI, Exhibit III), (FAA or FCC approval of new site never obtained due to attorney's apparent neglect, new counsel and engineer promptly retained); WVUW(TV) (Channel 51), Pittsfield, Massachusetts, *see Housatonic Broadcasting Company, Inc.*, (Video Services Division, released August 4, 1988) (reconsideration granted after permittee had shown original site unavailable for reasons beyond its control and permittee took all reasonable steps to find acceptable site that would meet zoning and FAA requirements); WEUX(TV) (Channel 48), Chippewa Falls, Wisconsin (BMPCT-880728KR) (pending modification filed in first year ran into FAA delays).

[20] In this connection, we note that steps Agape has taken toward commencing construction, *see* 4 *supra*, does not mitigate Community's failure to carry out the terms of its construction permit. *See Construction of Broadcast Stations*, 102 FCC 2d 1054, 1056 (1985).

has no bearing on Community's diligence in the construction of the station. *See L.E.O. Broadcasting, Inc.*, 2 FCC Rcd 1810 (M.M. Bur. 1987). Of the remaining funds expended, they include various travel expenses, legal fees, and payments to consulting engineers for their studies of the Grifton and Farmville sites. We note also that approximately $23,000 of the itemized legal fees, engineering expenses, and options paid on the two alternative transmitter sites were actually paid by LTA, not Community. Moreover, it appears that most of these funds have been incurred in prosecuting the subject assignment and modification applications with a view toward selling the station, not building it. In fact, Community states that "no funds have been spent on equipment and installation." Therefore, in its analysis of Community's showing under Sections 73.3534 and 73.3535 of the Rules, the staff was correct in concluding that "Community has taken no steps toward constructing WGTJ" and has "risked no funds" toward actual construction of the station.

13. Finally, the Applicants believe that the satellite proposal appears to be the motivating force behind the denial of all three applications, and that the staff's decision to deny the extension possibly emanated from recent Commission initiatives directed against satellite operations. Agape argues that the staff's resolution of the satellite issue, while unnecessary, was contrary to established Commission precedent and that the staff erred by giving no consideration to the alternative engineering amendment that would have eliminated the need for a satellite proposal. Community also alleges that the staff's fleeting reference to the alternative site, which the staff indicated would result in a substantial loss of service, is mistaken. Contrary to the Applicants' assertions, we find that, based on the entire record but independent of the other issues presented by the assignment and modification applications, the staff's assessment of the extension request was correct. As the above discussion clearly recognizes, the extension application was properly denied, thereby rendering all other issues moot. Accordingly, we see no need to address those issues any further.

CONCLUSION

14. Based on the foregoing, we find that the staff fully considered and properly decided the matter before it; namely, the extension application. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Community Service Telecasters, Inc. IS DENIED and, pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review filed by Agape Coastal Television, Inc. IS DENIED.

15. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail -- Return Receipt Requested to the parties named herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLVEND, INC. File No. I-T-C-91-208

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 16, 1991; Released: October 25, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Allvend, Inc. (Allvend).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-208 IS GRANTED and Allvend is authorized to provide international switched voice services by the resale of the international switched voice services set forth in Intellicall Operator Services, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the points listed in that tariff.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SPACENET CORP. File No. I-T-C-91-199(M)

Application for authority to provide
INTELNET I and INTELNET II service
via INTELSAT satellites.

ORDER AND AUTHORIZATION

Adopted: October 18, 1991; Released: October 25, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-199(M) IS GRANTED, and GTE Spacenet Corp. is authorized to establish channels of communications between the U.S. earth stations and INTELSAT AOR and POR satellites for the provision of INTELNET I and INTELNET II service between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103, DATANET I and DATANET II.

3. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between GTE Spacenet Corp. and its correspondents, and a copy of any agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VIVIAN E. WARNER

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A
in various markets[1]

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1991; Released: October 25, 1991

By the Commission:

I. INTRODUCTION

1. Warner filed petitions for reconsideration (Petitions)[2] of the dismissal [3] of her applications for the above-listed nonwireline cellular rural service areas (RSAs). *See supra* note 1. The carriers[4] who were granted authorizations for these markets, and Warner, filed responsive pleadings. In letter orders (Orders), the Mobile Services Division (MSD) denied Warner's Petitions.[5] Warner has now filed Applications for Review of the Orders. Warner also filed Motions to Revoke the authorizations of Macro, Petry and Wyndcell and a Motion to Show Cause against Cellwave and Colvin. *See supra* note 1.[6] The authorized carriers filed responsive pleadings. For the reasons set forth below, we deny Warner's Applications for Review, Motions to Revoke and Motion to Show Cause, and affirm the MSD's Orders.

II. DISCUSSION

2. In her pleadings, Warner alleges that the Commission has no authority to dismiss her applications following the grant of an authorization to a mutually exclusive applicant. She argues that the Commission's dismissal policy was adopted outside the scope of the Communications Act of 1934, as amended, (the Act) and Section 553 of the Administrative Procedure Act, as amended (the APA) and, therefore, cannot form the basis for dismissing her applications. Warner requests that her applications be returned to pending status until the Commission issues covering licenses to the authorized carriers pursuant to Section 1.68 of the rules. Finally, she contends that eight of the authorized carriers admit that they are financially unqualified.

3. The Commission's practice of dismissing mutually exclusive RSA applications following an authorization grant has been clearly stated:

> Pursuant to previous policies with respect to MSAs, only one licensee per frequency Block will be authorized, regardless of whether there are other non-mutually exclusive applications for an individual RSA. After the construction permits are issued for each frequency block, all other applications for the RSA will be dismissed.

Amendment of the Commission's Rules for Rural Cellular Radio Service, Order on Reconsideration (Order on Reconsideration), Erratum, 2 FCC Rcd 4008 (1987) (footnote omitted); *see Amendment of Rules Concerning Rural Cellular Service; Correction*, 52 Fed. Reg. 29,186 (1987) (summarizes *Order on Reconsideration*). Warner had sufficient notice and opportunity to comment on the Commission's dismissal practice during the rural cellular Rule Making proceedings, but failed to do so. *See, e.g., Amendment of the Commission's Rules for Rural Cellular Service, Notice of Proposed Rule Making (NPRM)*, CC Docket No. 85-388, 51 Fed. Reg. 405 (1985) ("[o]ur focus will. . . be on developing a process for quickly handling applications. . . for the areas outside of MSAs[:] . . . . [c]omments on all aspects of [our] analysis . . . are encouraged"). Warner alleges that the *NPRM* and *Order on Reconsideration* do not afford sufficient notice and opportunity for comment because dismissal was discussed in the context of whether multiple licenses would be issued in RSA markets. The context in which the dismissal practice was discussed when it was adopted is, of course, irrelevant to the question of whether the *NPRM* provided adequate notice under Section 553 of the APA. In any event, the decision to implement the dismissal practice flows from the decision to grant one license per frequency block. Because the two issues are directly related, we find Warner's allegation is entirely without merit. Warner's contentions therefore are rejected.[7]

4. Warner further contends that the Commission's dismissal practice is invalid because the Commission departed from its prior practice without setting forth its reasons for doing so. The Commission's dismissal practice for cellular RSA applicants, however, is consistent with its earlier-implemented dismissal practices for cellular Metropolitan Statistical Areas (MSA) service and thus is a continuation of, rather than a departure from, our policy applicable to cellular applicants.[8] Therefore, we reject Warner's contention.

5. Warner also argues that Section 309(i)(2) of the Act[9] precludes the dismissal of a losing cellular application prior to the issuance of a covering license. Warner claims that cellular licensure is a two-step process that requires examination of the qualifications of the lottery winner prior to issuance of both an authorization to construct and a license to operate. Warner also contends that Section 319(c) of the Act[10] and Section 1.68 of the rules[11] require the Commission to determine (prior to the issuance of a covering license) whether the cellular facilities were constructed as proposed and whether operation of the facilities would be in the public interest.

6. Warner's argument is based on a fundamental misunderstanding of our cellular licensing scheme. In *Revision and Update of Part 22 of the Public Mobile Radio Services Rules (Part 22 Update Order)*, 95 FCC 2d 769 (1983), *aff'd on reconsideration*, 101 FCC 2d 799 (1985), *aff'd on further reconsideration*, 2 FCC Rcd 1798 (1987), the Commission, in accordance with Section 319(d) of the Act[12], eliminated the two-step licensing process for cellular services (except for initial wireline cellular applicants). With the exception of certain wireline cellular facilities, not relevant here, an applicant files only one application for a license and, upon grant, is "issued one

authorization with a construction period included." *Part 22 Update Order*, 2 FCC Rcd at 1799. After completing construction, the authorized carrier "notif[ies] the Commission of completion of construction" in conformance with the proposal. *Id.* The authorization and the notification constitute the operating authority.[13] The Commission examines the applicant's qualifications in acting on the license application; it need not address these issues again when the notification is filed. Here, all the lottery winners were found qualified and granted authorizations. Warner's arguments regarding Section 319(c) and Section 1.68 are thus rejected.[14]

7. Warner also contends that her applications should not be dismissed because the Commission's statement (in *Amendment of the Commission's Rules to Reduce the Construction Period for Cellular Communications Systems, Report and Order (Amendment)*) that noncompliance with the 18-month construction deadline will result in "a grant . . . to another applicant[,]" means the Commission will use the original applicant lottery pool in the event of a re-lottery. *Amendment*, 60 Rad. Reg. 2d 1311, 1312 (1986). This statement is improperly read by Warner; it does not address which applications the Commission will use for a relottery. As noted, the Commission eliminated the two-step licensing process in the public mobile services (except for initial wireline cellular applicants). *See supra* para. 6. Once the authorization is issued, the unsuccessful lottery participants' applications are appropriately dismissed. Any failure by the authorized carrier to construct or otherwise comply with the rules may cause revocation or forfeiture of the authorization, which would lead to a new lottery, with newly-filed applications.[15]

8. In their variously-styled responses to Warner's Petitions, eight of the authorized carriers[16] state that Warner's incorrectly captioned Petitions have made it more difficult to obtain financing and take other steps to comply with Commission construction deadlines. Warner alleges that the authorized carriers thereby admit to being financially unqualified, and requests hearings to determine whether they are financially qualified to be Commission licensees. In addition, Warner filed Motions to Revoke against Macro, Petry and Wyndcell, and a Motion for a Show Cause Order (demonstrating why authorizations should not be revoked) against Cellwave and Colvin. *See supra* note 1. The authorized carriers respond that they remain financially qualified as required by Section 22.917(c) of the rules.[17] Statements by authorized carriers regarding the difficulty of completing financing arrangements due to perceived uncertainties following submission of pleadings affecting their grants do not, of themselves, constitute evidence of violations of Section 22.917(c) of the rules, and Warner offers no evidence to support her allegations. Warner's arguments are therefore rejected as failing to present a *prima facie* case. *See* 47 U.S.C. §309(d).

9. Warner's last argument is that the MSD denied three of her thirteen Petitions before the expiration of the pleading cycles.[18] Warner requests the Commission to reverse the MSD's decisions and remand the proceedings to set new filing deadlines. Each of Warner's Petitions raised identical legal arguments regarding the dismissal of her mutually exclusive applications. *See supra* para. 6. Warner offers no showing that the MSD's decisions substantially prejudiced her or that its decisions on the merits were incorrect. We have reviewed all of the pleadings here and, based on the entirety of the record, affirm the MSD's decisions on the merits.

III. CONCLUSION

10. The Commission properly dismissed Warner's applications. Furthermore, Warner's allegations that the authorized carriers are financially unqualified are completely without foundation. Accordingly, we find Warner's contentions meritless and affirm the MSD's Orders.

IV. ORDERING CLAUSES

11. IT IS ORDERED THAT Virginia E. Warner's Applications for Review, Motions to Revoke authorizations (filed against Macro Cellular Partners, Petry Television, Inc. and Wyndcell Corporation) and Motion for a Show Cause Order (filed against Cellwave, Inc. and Colvin Cellular Group) are DENIED.

12. IT IS FURTHER ORDERED THAT Virginia E. Warner's Motion to Revoke authorization filed against Liberty Cellular Partnership IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] Because of the similarity of the legal and factual issues, and for administrative convenience, we consider in this order thirteen applications for review which Vivian E. Warner (Warner) filed in the following markets: market numbers 358, Connecticut 2 (Windham) (Fee No. 9321172); 448, Kentucky 6 (Madison) (Fee No. 9329107); 450, Kentucky 8 (Mason) (Fee No. 9323437); 451, Kentucky 9 (Elliot) (Fee No. 9320752); 470, Masschusetts 1 (Franklin) (Fee No. 9324709); 472, Michigan 1 (Gogebic) (Fee No. 9311774); 473, Michigan 2 (Alger) (Fee No. 9305289); 478, Michigan 7 (Newaygo) (Fee No. 9312315); 480, Michigan 9 (Cass) (Fee No. 9308871); 585, Ohio 1 (Williams) (Fee No. 9307004); 587, Ohio 3 (Ashtabula) (Fee No. 9308383); 588, Ohio 4 (Mercer) (Fee No. 9305936); 594, Ohio 10 (Perry) (Fee No. 9309312). For the same reasons, we also consider Warner's Motions to Revoke the authorizations of Macro Cellular Partners (Macro), Petry Television, Inc. (Petry) and Wyndcell Corporation (Wyndcell) (the authorized nonwireline carriers for market numbers 588 (call sign KNKN852), 450 (call sign KNKN939) and 358 (call sign KNKN862), respectively), and a Motion to Show Cause against Cellwave, Inc. (Cellwave) and Colvin Cellular Group (Colvin) (the authorized nonwireline carriers for market numbers 480 (call sign KNKN857) and 587 (KNKN853), respectively).

Warner captions her first set of pleadings as Petitions for Reconsideration of the authorizations for the above-listed markets. She identifies the following file numbers: 10898-CL-P-472-A-89, 10899-CL-P-473-A-89, 10904-CL-P-478-A-89, 10906-CL-P-480-A-89, 10908-CL-P-585-A-89, 10910-CL-P-587-A-89, 10911-CL-P-588-A-89, 10917-CL-P-594-A-89, 10941-CL-P-358-A-89, 10947-CL-P-448-A-89, 10949-CL-P-450-A-89,

10950-CL-P-451-A-89 and 10957-CL-P-470-A-89. These file numbers correspond to the authorized carriers' applications. Warner's Petitions, in fact, challenge the dismissal of her mutually exclusive applications. Therefore, we correct Warner's procedural error by captioning these proceedings as in re Applications of Vivian E. Warner.

[2] *See* Public Notice, Report Nos. CL-91-1, CL-91-12 and CL-91-43 (released October 3, 1990, October 17, 1990 and November 30, 1990, respectively).

[3] *See* Public Notice, Report Nos. CL-90-295, CL-90-306, CL-91-24 (released August 30, 1990, September 20, 1990 and October 29, 1990, respectively).

[4] Danbury Cellular Telephone Company (Danbury), Petry, Alpha Cellular Telephone Company (Alpha), Templeton Inc. (Templeton), Buckhead Telephone Company, Inc. (Buckhead), Telesystems Communications (Telesystems), Liberty Cellular Partnership (Liberty), Cellwave, Colvin, Oak Cellular Associates (Oak), Macro, Skyline Cellular Partners (Skyline) and Kudzu Cellular Partners (Kudzu). The Commission granted Kudzu's application for a *pro forma* assignment of its authorization for RSA market 358 to Wyndcell, effective December 12, 1990. *See* Public Notice, Report No. CL-91-52 (released December 13, 1990).

[5] *See* Letters from Chief, MSD to Warner (November 21, 1990 and December 12, 1990).

[6] Warner also filed a motion to revoke the authorization of Liberty for market number 478. Warner subsequently withdrew her contentions supporting the motion. *See* Reply to Opposition to Motion to Revoke Authorization of Liberty and to Process the Application of Warner (filed March 19, 1990). Therefore, we are dismissing her motion as moot in view of this subsequent filing.

[7] We also note that notice and comment was not required because the question of when a non-granted application should be dismissed is a matter of agency practice and procedure. *See* 5 U.S.C. §553(b)(B). Moreover, Warner's challenge to the validity of the dismissal practice as adopted in the Rule Making proceeding is now untimely. *See* 47 U.S.C. §405.

[8] Clarifying its dismissal policy for cellular MSA markets, the MSD announced "that any mutually exclusive applications in cellular markets where an initial grant has been made are dismissed. *See* Public Notice, Report No. CL-87-101 (released December 18, 1986).

[9] Section 309(i)(2) of the Act provides in pertinent part:

> [n]o license or construction permit shall be granted to an applicant selected pursuant to . . . [a Section 309(i)(1) lottery] unless the Commission determines the qualifications of such applicant pursuant to . . . [Section 309](a) and section 308(b).

[10] Section 319(c) of the Act provides:

> [u]pon completion of any station for the construction . . . of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would...make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station.

[11] Section 1.68 of the rules implements Section 319(c) of the Act.

[12] Section 319(d) of the Act provides that "[a] permit for construction shall not be required for . . . mobile stations."

[13] *See* Part 22 Update Order, 95 FCC 2d 769, 773, 774 (1983), *aff'd on reconsideration*, 101 FCC 2d 799, 800, *aff'd on further reconsideration*, 2 FCC Rcd 1798, 1799; 47 C.F.R. § 22.43(c)(2).

[14] Even under a two-step licensing process, the Commisson is not required to address again qualifications issues if it is acting on a license to cover a construction permit. *See* 47 U.S.C. §319(c). In addition, neither Section 319(c) nor Section 1.68 addresses when a mutually exclusive non-granted application should be dismissed.

[15] Warner further contends that her applications should not be dismissed because the legislative history of Section 309(i)(2) of the the Act requires the Commission to conduct a lottery from the original applicant pool when the original lottery winner is found unqualified to be a licensee. Here, however, all the applicants were found qualified and granted authorizations before Warner's applications were dismissed.

[16] Alpha, Buckhead, Danbury, Cellwave, Colvin, Kudzu, Macro and Skyline.

[17] Section 22.917(c) of the rules states that a nonwireline applicant must demonstrate that it has a firm financial commitment at the time its application is filed proposing to provide cellular service to RSAs. The firm financial commitment must be maintained for six months from the date the applicant is announced as tentative selectee. *See* Letter from Chief, Common Carrier Bureau to A. Thomas Carroccio, Esq. (July 14, 1989), 66 Rad. Reg. 2d 1140 (1989).

[18] *See* Public Notice, Report Nos. CL-91-12 and CL-91-43 (released October 17, 1990 and November 30, 1990, respectively) (announcing deadlines for filing oppositions and replies in market numbers 448, 450 and 478).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-334

In the Matter of

Amendment of Section 73.202(b),	RM-6716
Table of Allotments,	RM-7046
FM Broadcast Stations.	
(Stuart and Boone, Iowa)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1991; Released: October 25, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Kelly Communications, Inc., ("Kelly") licensee of Station KWPN(FM), West Point, Nebraska, challenging the Commission's *Report and Order* in this proceeding, 5 FCC Rcd 4537 (1990). That *Report and Order* allotted Channel 300A at Stuart, Iowa, substituted Channel 252C3 for Channel 252A at Boone, Iowa, and modified the license of Station KZBA(FM), Boone, Iowa, to specify operation on Channel 252C3. Coon Valley Communications ("Coon"), petitioner for the new allotment at Stuart, filed an opposition to the petition for reconsideration.

BACKGROUND

2. The *Notice of Proposed Rule Making* in this proceeding, 4 FCC Rcd 5992 (1989), originally proposed the allotment of Channel 251A to Stuart, Iowa, as the community's first local FM service. Thereafter, G.O. Radio Boone, Inc. ("Radio Boone"), licensee of Station KZBA(FM), Channel 252A, Boone, Iowa, filed a timely counterproposal to upgrade its station by substituting Channel 252C3 for Channel 252A at Boone and modifying its license accordingly. In the *Report and Order* in this proceeding, the conflict between these mutually exclusive proposals was resolved by allotting Channel 300A as an alternative channel at Stuart[1] and granting Radio Boone's request to upgrade Station KZBA(FM) on Channel 252C3 at Boone.

THE PLEADINGS

3. In its petition for reconsideration, Kelly requests that the Commission substitute Channel 289A for Channel 300A at different coordinates[2] from those stated in the *Report and Order*. Kelly states that its pending application (File No. BPH-900713IH) for a construction permit proposing a minor change of facilities is short spaced to the coordinates allotted by the Commission for Channel 300A at Stuart and that its suggested substitution should accommodate its own proposal and maintain the allotment at Stuart. Kelly states that its request would serve the public interest because the purpose of its application is to implement a rule making in which Station KWPN-FM was granted an upgrade from Channel 300A to Channel 300C1.

4. Coon opposes the petition for reconsideration based on its determination that use of Channel 289A instead of Channel 300A would require a severe site restriction and thereby limit its ability to place a city grade signal of 70 dBu over the community of Stuart. Coon notes that Stuart is located in two counties, Adair and Guthrie, and states that it intends to serve both counties. It argues, however, that the site restriction imposed by use of Channel 289A will severely limit service to Guthrie county. Coon also argues that Station KWPN's upgrade was granted based on coordinates which would cause no shortspacing to the Stuart allotment on Channel 300A, and that Kelly's application, filed after grant of the Stuart allotment, proposes a site at different coordinates than those allotted, and therefore merits no protection. Last, Coon contends that Kelly's application is a mere site preference and should not be given priority over the new allotment at Stuart.

DISCUSSION

5. After careful review of the pleadings and underlying facts, we will deny Kelly's petition for reconsideration. First, it is well settled that an application designating a change of transmitter site is a mere site preference and does not present sufficient public interest benefit to warrant preference over a new proposal. *See Angola, et al., Indiana; Brooklyn, et al., Michigan*, 6 FCC Rcd 1230, 1231 (1991); *Cookeville, et al., Tennessee*, 5 FCC Rcd 677, 678 (1990); and *Andalusia, Alabama*, 49 FR 32201 (1984). Even considering a possible channel substitution, a staff engineering analysis using the Commission's Rules applicable to Class A maximum power which became effective October 2, 1989, shows that use of Channel 289A would require a site restriction, and that the site proposed by Kelly would be technically deficient pursuant to Section 73.315(a) of the Commission's Rules because it would place the transmitter at too distant a location to place a minimum field strength of 70dBu or 3.16 mV/m over the entire community.[3] *See Panama City Beach, Florida*, 4 FCC Rcd 1598 (1989); *Greenwood, et al., South*

[1] In its comments, Coon had expressed a preference for the allotment of Channel 293A at Stuart to accommodate a transmitter site it had secured. This allotment was not considered because Coon did not provide a complete engineering study in support, and because, as a site preference, it did not warrant protection.

[2] The coordinates Kelly proposes for Channel 289A at Stuart are 41-24-11 and 94-27-09.

[3] Specifically, Kelly's proposed reference coordinates for Channel 289A are located 17.0 kilometers from the farthest boundary of Stuart whereas a Class A FM station, operating at maximum facilities, can provide a city grade signal that extends 16.2 kilometers. To address this deficiency, Kelly argues that, taking into account the actual terrain along a specific radial from its proposed site, a city grade signal will extend 17.8 kilometers and cover all of Stuart with a 70 dBu signal. We cannot, however,

Carolina, and Biltmore Forest, North Carolina, 2 FCC Rcd 3583 (1987), *recon. denied*, 3 FCC Rcd 4108 (1988). We also note that two applications have been filed for the Channel 300A allotment at Stuart, and neither of these applications is compatible with the requested channel substitution on Channel 289A. Furthermore, Kelly has given no rationale to support our favoring its application over those two others by substituting Channel 289A for Channel 300A as it requests. Based on the above, the relative equities indicate that the public interest will be served if Channel 300A at Stuart, Iowa, stands as allotted.

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Kelly Communications, Inc., IS DENIED.

7. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

make an allotment based on Kelly's showing because in predicting city grade coverage at the allotment stage, we generally assume uniform, as opposed to actual, terrain. Furthermore, while we have in a few limited cases taken into account the actual terrain along specific radials in determining city grade coverage, we have only done so when an existing licensee seeks to upgrade a station at a specific site which it intends to use and is available to it. *See, e.g., Woodstock and Broadway, Virginia* , 3 FCC Rcd 6398 (1988). Since the allotment at issue in this case is for a new FM channel, as opposed to an upgrade, and since none of the applicants for that channel have indicated that they would use this site, we cannot accept Kelly's showing. Moreover, one of the applicants, Coon, has questioned the suitability of Kelly's proposed site for an FM transmitter, noting that a good portion of it is "bottomland" and that another part is occupied by the county landfill.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-304

In the Matter of

Amendment of Section 73.606(b), RM-7787
Table of Allotments,
Television Broadcast Stations.
(Albion, Lincoln and Columbus,
Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 10, 1991; Released: October 25, 1991

Comment Date: December 16, 1991
Reply Comment Date: December 31, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Citadel Communications Company, Ltd. ("petitioner"), requesting the substitution of UHF TV Channel 18 for VHF TV Channel 8 at Albion, Nebraska, the reallotment of Channel 8 from Albion to Lincoln, Nebraska, as the community's second local commercial television service, and the modification of Station KCAN's license to specify Lincoln as its community of license. Alternatively, petitioner proposes the reallotment of Channel 8 from Albion to Columbus, Nebraska, as the community's first local television service, as well as the allotment of Channel 18 to Albion. Petitioner states that it will apply for Channel 8 at Lincoln or Columbus and Channel 18 at Albion, if allotted.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a higher class channel and/or a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM and TV Authorizations to Specify a New Community of License* ("*Change of Community R&O*"), 4 FCC Rcd 4870 (1989), *recon. granted in part* ("*Change of Community MO&O*"), 5 FCC Rcd 7094 (1990). Petitioner recognizes that the Commission prohibits the removal of a community's sole local transmission service, except in rare circumstances. Thus, to ensure that Albion is not deprived of its sole local transmission service, petitioner states that it will seek authorization to operate Channel 18 at Albion. If successful, petitioner states that it will operate the Albion station with the same programming presently provided by Station KCAN; that is, as a satellite of Station KCAU-TV, Sioux City, Iowa. Further, if there are competing applications for use of Channel 18 at Albion, petitioner states that it will request authorization as an interim licensee pending selection of a permittee. Finally, it states that it will begin operation on Channel 18 at Albion simultaneously with the relocation of Channel 8 to Lincoln.

3. Lincoln (population 171,932 persons) is the capital of Nebraska, the second largest city in the state and 85th largest city in the United States.[1] Petitioner describes Lincoln as a major center for manufacturing and distribution and second only to Omaha, Nebraska, in importance within the state. In addition, Lincoln is the home of the University of Nebraska, with a student population of approximately 24,000. Television Channels 10+, *12-, *45, and 51 are allotted to Lincoln. Station KOLN is licensed to operate on Channel 10, noncommercial educational Station KUON is licensed to operate on Channel *12, and Channels *45 and 51 are unoccupied and unapplied for. Therefore, there is only one network-affiliated full service television station, and one noncommercial station, licensed to Lincoln. According to petitioner, there are network affiliated stations licensed to Omaha, but those stations do not place a Grade A signal over Lincoln.[2] Petitioner argues that no other city of Lincoln's size is equally underserved, and no state capital has such limited local television service. [3]

4. Albion (population 1,997 persons), the seat of Boone County, is located approximately 180 kilometers (110 miles) northeast of Omaha. Albion is not within the Lincoln or any other Urbanized Area. Channels 8+ and *21+ are allotted to Albion. Station KCAN is licensed to operate on Channel 8 and Channel *21 is unoccupied and unapplied for. Petitioner contends that Albion is extraordinarily well served for a community of its size, receiving local transmission service from Station KCAN, which would continue operation on Channel 18 instead of Channel 8 under petitioner's proposal, as well as service from translators and cable television. Petitioner states that Albion was a small rural community of 1,982 persons in 1962 when the allotment was made and remains very small today. Further, it contends that there is little prospect that Albion will grow into a large urban center.

5. Petitioner submits that the allotment of Channel 8 to Albion was an aberration because VHF allotments, with their broader coverage capability, are intended for larger communities in urban settings. Petitioner cites the following from the *Sixth Report and Order*, 41 FCC 148 (1952):

> [p]rimary consideration [in allotment decisions] was given to the fact that VHF can effectively cover large areas, and VHF was used wherever possible in larger cities since such cities have broad areas of common interest.... Thus, the Commission concluded that in order to achieve an equitable distribution of facilities, metropolitan centers with their large aggregations of people should be assigned more VHF channels than communities comprising fewer people."

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[1] Population figures are taken from the 1980 U.S. Census.

[2] According to petitioner, Lincoln receives a Grade A signal from Omaha independent Station KPTM, Channel 42.

[3] Petitioner submits that there are approximately a dozen cities of Lincoln's size or larger with only one or no television stations licensed to the community. However, it states that these cities are all part of major metropolitan areas and have Grade A or better service from stations licensed to the major city.

Id. at 168. Petitioner also cites *Medford, Oregon,* 7 R.R. 2d 1656 (1966) (preferred larger city with several services to small town with no other local service), and *Alliance, Hay Springs and Scottsbluff, Nebraska,* 34 FCC 2d 1111 (1978) (Commission rejected a claim that a VHF channel should have been allotted to a community which had no local service over a larger community with one local service, classifying the community of Alliance, with a population of 8,500 persons, as a small community for allotment purposes). Petitioner claims that Albion is one of the smallest towns in the United States to have a commercial VHF allotment while Lincoln, with a population 100 times greater, has only one commercial VHF allotment. Finally, petitioner states that Albion is incapable of supporting its own television station, noting that Station KCAN has operated as a satellite station for all but three of its twenty-six years and, despite efforts to streamline the station's operations, continues to lose money yearly.

6. Petitioner states that adoption of its proposal will result in a preferential arrangement of allotments because the much larger community of Lincoln will receive its first competitive commercial television service and Albion will retain its first local television service by the allotment and activation of Channel 18. Petitioner also states that if the transmitter site it envisions is used, the new Albion station will provide Grade B service to 98,471 persons within a 21,642 square kilometer (8,360 square mile) area including a first television reception service to 886 persons within 223 square kilometers and a second television reception service to 9,036 persons within a 3,717 square kilometer area.[4] In addition, it notes that Station KCAN is presently operated as a satellite of co-owned Station KCAU(TV), Sioux City, Iowa. However, because the existing Grade B contour overlap between the two stations will be substantially reduced, from 8,360 square kilometers to 619 square kilometers, petitioner states that the two stations can be programmed separately, citing *Central Minnesota Television, Inc.,* 2 FCC Rcd 6730 (1987), and *Pete Stathankas,* 59 RR 2d 169 (1985).

7. Alternatively, petitioner requests that Channel 8 be reallotted to Columbus, Nebraska, as the community's first local television service, if the Commission is unwilling to reallot Channel 8 to Lincoln. Petitioner states that Columbus, in Platte County, has a 1980 population of 17,328 persons and a preliminary 1990 U.S. Census population of 19,480 persons. In addition, Columbus is not located within any Urbanized Area.

8. We believe the public interest would be served by seeking comments on the proposals advanced by petitioner. This proposal could provide a first local competitive commercial television service to Lincoln or a first local television service to Columbus, and could also result in the provision of a first local full service television service to Albion. In *Change of Community MO&O, supra,* the Commission expressed concern over proposals which seek to shift service from underserved rural areas to well-served urban areas. Here, petitioner seeks to move from the rural community of Albion to the Lincoln Urbanized Area. In this instance, Lincoln, with a population of almost 200,000 persons, has only one local commercial and one noncommercial educational television service and thus does not appear to be "well-served." In addition, because of the reduction in the contour overlap of co-owned Stations KCAU-TV at Sioux City, Iowa, and KCAN at Lincoln, the new station on Channel 18 at Albion, if ultimately licensed to petitioner, need not be operated as a satellite station. We also believe that consideration of this proposal is warranted because petitioner proposes the allotment of Channel 18 to Albion as a replacement for Channel 8 and commits to its activation. While the replacement of Channel 8 with a vacant allotment would not alleviate our concerns over the removal of Albion's only local television transmission service, a service relied upon by community residents, petitioner commits to have the Albion Channel 18 station on the air simultaneously with its relocation of Channel 8 to Lincoln. Therefore, no significant service interruption would result.

9. Channel 8 can be allotted to Lincoln with a site restriction of 42.8 kilometers (26.6 miles) northwest to avoid a short-spacing to Station KCCI, Channel 8, Des Moines, Iowa, and to avoid the Lincoln "freeze" area. *See Order,* 52 FR 28346, July 29, 1987. Channel 8 can alternatively be allotted to Columbus without the imposition of a site restriction. Channel 18 can be allotted to Albion, Nebraska, with a site restriction of 36.2 kilometers (22.5 miles) northwest to avoid short-spacings to Station KXNE, Channel 19, Norfolk, Nebraska, and to unused and unapplied for Channel *21 at Albion.[5]

10. As requested, we also propose to modify petitioner's license for Station KCAN to specify either Lincoln, Nebraska, or Columbus, Nebraska, as the station's community of license. We specifically seek comment on whether the public interest would be better served by reallotting Channel 8 to either Lincoln or Columbus, or by its retention in Albion. The allotment of Channel 8 at Lincoln is mutually exclusive with its use at Albion as the two communities are located approximately 74 kilometers (46 miles) apart while the Commission's Rules stipulate a minimum distance separation of 190 miles. The allotment of Channel 8 at Columbus is also mutually exclusive with its use at Albion as the communities are located approximately 29 kilometers (18 miles) apart while the Commission's Rules stipulate a minimum distance separation of 306 kilometers (190 miles). Therefore, in accordance with Section 1.420(i), we will not accept competing expressions of interest in use of Channel 8+ at either Lincoln or Columbus.

11. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the communities listed below, to read as follows:

[4] First and second television service is based on facilities of 250 kW effective radiated power and 366 meters height above average terrain at its proposed transmitter site. North Latitude 41-56-00 and West Longitude 98-17-30.

[5] The coordinates for Channel 8+ at Lincoln are North Latitude 41-01-10 and West Longitude 97-07-23. The coordinates for Channel 8+ at Columbus are 41-25-30 and 97-21-36. The coordinates for Channel 18 at Albion are 41-56-00 and 98-17-30.

City	Channel No. Present	Proposed
Albion, Nebraska	8+, *21+	18, *21+
Lincoln, Nebraska	10+, *12-, *45, 51	8+, 10+, *12-, *45, 51
	OR	
Albion, Nebraska	8+, *21	18, *21
Columbus, Nebraska		8+

12. The Commission's authority to institute rule making proceeding, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

13. Interested parties may file comments on or before **December 16, 1991,** and reply comments on or before **December 31, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eric L. Bernthal, Esq.
Kevin C. Boyle, Esq.
Michael I. Gilman, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(Counsel to petitioner)

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submis-

sions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-108

In the Matter of

Amendment of Section 73.202(b), RM-6606
Table of Allotments,
FM Broadcast Stations.
(Sonora, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1991; Released: October 25, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein a *Notice of Proposed Rule Making* ("*Notice*") in this proceeding, 4 FCC Rcd 4040 (1989), in response to a petition (RM-6606) filed on behalf of H Group, Inc., ("H Group"), licensee of Station KZSQ(FM), Channel 224A (92.7 MHz), Sonora, California. H Group seeks to upgrade its station by substituting Channel 224B1 for Channel 224A at Sonora and modifying its license to specify operation on the higher class channel. Clear Mountain Air Broadcasting Company ("Clear"), licensee of Station KKBN(FM), Channel 228A (93.5 MHz), Twain Harte, California, submitted opposing comments and supplemental comments. H Group filed comments, reply comments, and a reply to Clear's supplemental comments.[1]

BACKGROUND

2. In the *Notice* in this proceeding, we stated that H Group's proposed transmitter site is located farther from Sonora than the maximum distance the Commission normally assumes for the provision of city grade coverage. Specifically, H Group's proposed transmitter site is located 23.6 kilometers east of Sonora, whereas the Commission assumes that a city-grade signal of 70 dBu or 3.16 mV/m for a Class B1 FM station would extend 23.2 kilometers, based on the use of the Commission's standard prediction method and uniform terrain. To address this deficiency, H Group sought to avail itself of the limited exception to our allotment policy of predicting city-grade coverage based upon the assumption of uniform terrain. Under this exception, as set forth in *Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988) ("*Woodstock*"), an existing licensee seeking to upgrade its facility at a specific site that is available to it can establish city-grade coverage over the entire community of license based upon an analysis of the terrain characteristics along specific radials. In its petition, H Group sought to demonstrate that the most distant point in Sonora from its proposed transmitter site on a bearing of 275.5 degrees is 24.9 kilometers and that, taking into account actual terrain characteristics along that radial, a Class B1 station, assuming maximum facilities, would extend 26.1 kilometers on that bearing.

THE PLEADINGS

3. In its comments, H Group reaffirms its interest in the Channel 224B1 upgrade at Sonora and the license modification for its Station KZSQ(FM). Clear, in its comments, opposes the upgrade, contending that even using the limited exception set forth in *Woodstock*, H Group's showing does not demonstrate that principal city coverage would be achieved because of terrain obstructions. Clear attaches an engineering statement showing that from H Group's proposed site 23.6 kilometers east of Sonora, "substantial line-of-sight disruptions caused by surrounding terrain" would cause shadowing over 41% of the city. Clear calculated, along the azimuth from that site to the reference coordinates for Sonora, diffraction losses caused by a hill just outside the city. Those diffraction losses, computed using Tech Note 101 and another recognized propagation model, would serve to reduce the received field strength to 66.4 dBu or less at those coordinates, contends Clear. It also claims that in other areas of Sonora "similar losses would be expected." Claiming that only seven percent of Sonora would receive an unshadowed signal, Clear also submits that H Group's proposal for an upgrade would result instead in a diminution of service to the community of license, which, it argues, is not in the public interest. Therefore, Clear urges, we should deny H Group's proposal.

4. In reply, H Group asserts that Clear's technical showing is faulty and that a field strength of more than 70 dBu would indeed be received over Sonora from its proposed site. H Group attaches to its reply an engineering statement in which the predicted received field strengths are determined at fifteen different points in Sonora using Tech Note 101.[2] The attachment includes a map of the city on which these fifteen points are superimposed. H Group then takes the median of these fifteen predicted field strengths, nine of them greater than 70 dBu, to arrive at a field strength of 72.8 dBu. It is claimed that this methodology is in accordance with Section 73.314(c) of the Commission's Rules. Consequently, H Group declares that its proposal would satisfy the requirement that all of Sonora would be provided with 70 dBu coverage. H Group cites as support for this methodology *Greater Media, Inc. (WHEZ)* ("*Greater Media*"), 61 FCC 2d 692, 693

[1] Clarke Broadcasting Corporation ("Clarke") filed a statement reporting the consummation of a *pro forma* assignment of H Group's license for Station KZSQ(FM) to Clarke, pursuant to Commission approval. *See* File No. BALH-900213EB. In its statement, Clarke reaffirms H Group's commitment to apply for Channel 224B1, if allotted, and to subsequently construct the upgraded facility.

[2] H Group's engineering consultant developed path terrain profiles along each of the azimuths (in a span from 271.71 to 278.06) from the proposed site to the 15 points lying on the intersections of a grid superimposed on a map of Sonora. All points fell within the city limits, and the respective free-space diffraction losses were calculated in accord with the Tech Note 101 formulation for rounded obstacles, using 30-second data. At each point, the resulting field strength was tabulated assuming the proposed effective radiated power of 0.45 kW.

(1976), and *Magdalene Gunden Partnership* ("*Magdalene Gunden*"), 2 FCC Rcd 1223, 1229-30 (Admin. L.J. 1987), *aff'd*, 2 FCC Rcd 5513, 5514 (Rev. Bd. 1987), *recon. denied*, 3 FCC Rcd 488 (Rev. Bd. 1988), *rev. denied*, 3 FCC Rcd 7186 (1988).

5. In response, Clear filed supplemental comments, contending that H Group has inappropriately combined two disparate methodologies for determination of the received field strength--that of the Commission's F(50,50) propagation curves for predicting field strength and that outlined in Section 73.314(c) for determination of actual field strength. Clear notes that H Group tabulated the field strength values as predicted by the F(50,50) curves at points on a grid superimposed on a map of Sonora. Averaging these values to determine compliance with principal city coverage, as H Group did, is incorrect, argues Clear. It states that Section 73.314(c) provides for use of a grid "only with *actual measured* field intensity readings taken under precisely controlled conditions" (emphasis in original). Clear contends that acceptance of H Group's method would mean that any proposal for which one-half of the grid points over a community showed a predicted field strength of 70 dBu or greater would satisfy principal city coverage requirements, regardless of whether it was predicted that the other half of the community received signal strengths of less than 70 dBu. Indeed, Clear argues, H Group's "own grid analysis confirms that approximately 40% of the city will not receive a [70 dBu] signal." Finally, Clear maintains that of the cases cited by H Group, *Magdalene Gunden* "does not constitute an official endorsement of the methodology" employed there and *Greater Media* deals with whether a collection of actual field strength readings using the "grid measurement procedure" was sufficient to show the adequacy of an existing station's coverage.

6. H Group responds that Clear's supplement is fatally flawed because no engineering statement is provided supporting its allegations. H Group contends that its methodology is "considerably more accurate in its technique than the misleading single-profile showing that was presented in Clear's initial comments..." It defends its use of a grid as providing a "random, yet statistically accurate, sample of points... from which terrain profile measurements may be taken." H Group argues that the "use of a grid insures a random distribution of measurement points throughout a community." Clear's interpretation of the two cases cited above was also faulty, asserts H Group, because 1) the Review Board clearly accepted the Tech Note 101 showing in *Magdalene Gunden* in reaching its decision that the applicant had indeed demonstrated 70 dBu coverageand 2) in both *Greater Media* and the instant case, principal city coverage obtains when 50 percent of the community is shown to receive at least 70 dBu.

DISCUSSION

7. After detailed engineering analysis, we will deny H Group's petition because it has not shown that a Class B1 facility would be able to provide from its proposed site the requisite 70 dBu coverage over the entire community of Sonora. Specifically, H Group has failed to rebut the showing by Clear that, by using an alternate propagation methodology that accounts for the specific terrain along the azimuth toward the community of Sonora, a 70 dBu signal cannot be provided over that entire community from a site located 23.6 kilometers east of Sonora. It was recognized by all parties to this proceeding that using the Commission's standard propagation methodology which assumes uniform average terrain in all directions from the transmitter site (used to determine the antenna height above average terrain ("HAAT")), it would not be possible to provide principal city coverage. In such a case, the Commission may permit the use of actual terrain data along a specific radial toward the principal city so that the range of the signal along an azimuth toward the city can be determined (for determination of the antenna HAAT only along that radial). As dictated by *Woodstock*, only an existing licensee seeking to upgrade its facilities on a co-channel or an adjacent channel at a specific site available to it may avail itself of this limited exception. Such licensee may predict the received signal strength using the HAAT along that radial and then apply the Commission's F(50,50) curves. An alternative propagation methodology, *e.g.* Tech Note 101, may be employed, where the level of the received signal is derived predicting how specific terrain obstructions along a specific radial would affect the signal. H Group stated that it used the former method in its petition for rule making, and the latter method in attempting to rebut Clear's showing that H Group had not demonstrated that its proposal could provide a 70 dBu signal over the entirety of Sonora.

8. As pointed out by Clear, in H Group's reply using the latter methodology nearly half of the fifteen points on its grid are less than 70 dBu. H Group's attempt to justify taking an average of these values to demonstrate compliance with the minimum principal city coverage is flawed. H Group inappropriately combines a propagation methodology to predict received field strengths with a few of the detailed procedures for making and reporting actual field strength measurements taken in the field in a specific community. Principal city coverage, in accord with Section 73.315, means that within a 70 dBu contour, in terms of statistical probability, at least one-half of the locations within the contour receives a field strength of 70 dBu or greater at least one-half of the time. In other words, at every location within that 70 dBu contour, the predicted field strength is at least 70 dBu. However, only in a theoretical sense, can it be said that such coverage obtains when at least one-half of a very large, undetermined number of locations receives a minimum 70 dBu field strength. More importantly, the Commission has sanctioned no methodology such as H Group's to demonstrate at the allotment stage that principal city coverage exists by showing that at least one-half of a finite number of locations receives a minimum predicted field strength of 70 dBu.

9. Of course, in a given community a party may choose to make actual field strength measurements, some of which may indeed be less than 70 dBu, to demonstrate compliance with principal city coverage. If a party so chooses, the guidelines of Section 73.314(c) must be followed, which, among others, provide for the use of a procedure in which actual field strength readings are taken at locations determined by a grid superimposed over a map of the city. The Commission deems that the median of measured field strengths taken at a minimum of fifteen grid intersections, depending on the population of the community, serves as a reliable indicator of what field strength would be received over the entire commu-

nity.[3] That median should be 70 dBu or greater for principal city coverage. Therefore, the Rules do specify a methodology for making and reporting actual field strength measurements in order to demonstrate compliance with the Commission's requirements.

10. H Group did not obtain actual field strength readings in Sonora. H Group uses instead a series of predicted field strengths and inappropriately applies the methodology specified for finding the median of actual field strength measurements taken on the ground in the community of Sonora. While the Commission considers the median of only fifteen measured field strengths as an acceptable measure of the field strength expected to be received in a small community, H Group has not shown that there is a finite number of predicted field strengths to properly serve as the basis for a reliable median, and if so, what that number should be.[4] We must be able to conclude that such median is as statistically reliable as that determined with actual field strength measurements. In any event, H Group's invocation of Section 73.314 as the basis for its choice of fifteen predicted field strengths is incorrect. That section of the Rules does not relate to prediction methodology, but to the taking of actual measurements of field strength, as its title, "[f]ield strength measurements" denotes. Thus, H Group's showing is defective and cannot support its assertion that a Class B1 station at its proposed site would provide principal city coverage of Sonora.

11. As to the case law cited by H Group, we are not bound by *Magdalene Gunden* as it involves a decision made at the application stage. While there are similarities in the methodology employed there with that employed with the instant allotment case, the Commission has an overriding concern with establishing FM allotments on which technically viable stations can operate. Accordingly, we require strict adherence to our technical rules at the allotment stage including the theories underlying the Commission's prediction methodology. Failure to do so could result in an inefficient use of the allotment and could preclude other more efficient uses of FM channels in other communities. Were this to occur, the integrity of the Commission's system of allotting FM channels would be compromised. *See, e.g., Chester, South Carolina*, 5 FCC Rcd (1990), quoting *Milligan, Maryland*, 45 RR 2d 1689, 1690-91 (B'cast Bur. 1979). Finally, *Greater Media* does not support H Group's position either. That case dealt with whether principal city coverage obtained when fewer than one-half of actual field strengths measured less than 70 dBu. Here, of course, H Group made no measurements in Sonora.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That the Petition for Rule Making filed on behalf of H Group, Inc. IS DENIED.

13. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

14. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 634-6350.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[3] In essence, the Commission has provided that if the population of the community is 24,024 or less, the number of locations shall be 15. The 1980 population of Sonora was 3239. *See* § 73.314(c)(1)(ii).

[4] We recognize that there is a degree of uncertainty as to whether the median of any given number of measured signals is truly representative of what signal level, on the average, a community can expect to receive. However, the uncertainty of such values taken from actual field strength measurements is far less than any field strength predictions derived using the Commission's F(50,50) curves, Tech Note 101, or any other prediction methodology. Consequently, the median of predicted field strengths set forth by the H Group has a level of uncertainty much too great for us to have any confidence in it as a reliable predictor of the field strength that would be likely received in Sonora.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-216

In the Matter of

Amendment of Section 73.202(b), RM-7742
Table of Allotments,
FM Broadcast Stations.
(Camas, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 10, 1991; Released: October 25, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of KMAS Broadcasting Corporation ("petitioner"), permittee of Station KMUZ(FM), Channel 234A, Camas, Washington, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4392 (1991), proposing the substitution of Channel 234C3 for Channel 234A at Camas and the modification of its construction permit to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 234C3 for Channel 234A to Camas, Washington, since it would provide the community with a wide coverage area FM transmission service. Channel 234C3 can be allotted to Camas in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site with a site restriction of 19.1 kilometers (11.9 miles) east of the community.[1] Concurrence of the Canadian government has been obtained, since Camas is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KMUZ(FM) at Camas to specify operation on Channel 234C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Camas, Washington	234C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of KMAS Broadcasting Corporation, Camas, Washington, for Station KMUZ(FM), IS MODIFIED to specify operation on Channel 234C3, in lieu of Channel 234A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, KMAS Broadcasting, permittee of Station KMUZ(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 234C3 at Camas are North Latitude 45-31-39 and West Longitude 122-10-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-305

In the Matter of

Amendment of Section 73.202(b), RM-7825
Table of Allotments,
FM Broadcast Stations.
(Lovington, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 10, 1991; Released: October 25, 1991

Comment Date: December 16, 1991
Reply Comment Date: December 31, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Lea County Broadcasting ("petitioner") requesting the substitution of Channel 269C3 for Channel 269A at Lovington, New Mexico, and the modification of its license for Station KLEA-FM to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 269C3 for Channel 269A at Lovington since it could provide the community with a wide coverage area FM service and enable Station KLEA-FM to expand its coverage area. Channel 269C3 can be allotted to Lovington in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.9 kilometers (4.9 miles) south to accommodate petitioner's desired transmitter site.[1] Because Lovington is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been requested.

3. We also propose to modify Station KLEA-FM's license to specify operation on Channel 269C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 269C3 at Lovington or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lovington, New Mexico	269A	269C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 16, 1991,** and reply comments on or before **December 31, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Bodorff, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 269C3 at Lovington are North Latitude 32-52-43 and West Longitude 103-19-12.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-85

In the Matter of

Amendment of Section 73.202(b), RM-7147
Table of Allotments,
FM Broadcast Stations.
(Greenville, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1991; Released: October 25, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 5 FCC Rcd 1263 (1990), proposing the substitution of Channel 228C2 for Channel 228A at Greenville, Texas, and the modification of the license of Station KIKT, Greenville, Texas, to specify operation on Channel 228C2. First Greenville Corporation, Melanie Bruton, Madalina Broadcasting, Inc., Haltom City Radio Partners, John W. Barger, and Q Prime Inc. filed comments. Lenox Broadcasting Corporation filed comments and a counterproposal. First Greenville Corporation and John W. Barger filed reply comments. For the reasons discussed below, we are substituting Channel 228C2 for Channel 228A at Greenville and are modifying the Station KIKT license to specify operation on Channel 228C2.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by First Greenville Corporation ("First Greenville"), licensee of Station KIKT, Channel 228A, Greenville, Texas, proposing the substitution of Channel 228C2 for Channel 228A at Greenville, and modification of its Station KIKT license to specify operation on Channel 228C2. As noted by First Greenville, this upgrade proposal requires a change in the Station KIKT transmitter site. The proposed Channel 228C2 upgrade at Greenville complies with the Commission's minimum spacing requirements. However, the *Notice* specifically noted that this upgrade would be short-spaced to eleven of the 28 applications for the Channel 227C2 allotment at Haltom City, Texas.[1] In this regard, the *Notice* stated that if the Channel 228C2 upgrade is ultimately granted, these applicants will be permitted to amend their applications without loss of cut-off protection.

3. Six of the eleven short-spaced applicants filed comments in this proceeding. The gravamen of these comments concern the costs of amending their applications, the fact that amending these applications would entail a reduction in the number of persons that will receive service from these proposals, and the fact that amending these applications will delay the ultimate selection of the permittee for the Haltom City allotment. In addition, Lenox Broadcasting Corporation ("Lenox") filed a counterproposal proposing a Channel 228C2 upgrade for Station KIKT, and a change in its community of license from Greenville to Cooper, Texas. In reply, First Greenville notes that 17 of the 28 applicants for the Haltom City allotment were not short-spaced to its proposed upgrade. In addition to rejecting any change in its community of license, First Greenville claims that it would not be unfair to require these applicants to amend their applications to accommodate an upgrade in service.

DISCUSSION

4. At the outset, we are dismissing the counterproposal filed by Lenox proposing the change in the Station KIKT community of license from Greenville to Cooper, Texas. As noted by Lenox, Section 1.420(i) of the Rules permits the Commission, in the course of a rule making proceeding, to both amend the Table of Allotments and modify a license to specify a new community of license. Section 1.420(i) is intended to provide a procedure whereby a licensee or permittee may seek to have its license modified to a new community of license without placing its existing authorization at risk. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 4873 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). There is nothing in *Modification of FM and TV Authorizations to Specify a New Community of License*, *supra*, to suggest that this procedure is intended to be used by third parties as a means to change the community of license of another party's station. Furthermore, First Greenville has disavowed any interest in either pursuing or implementing a change in community of license for its Station KIKT. In view of the above, the Lenox counterproposal is being dismissed without further consideration.

5. Melanie Bruton and Madalina Broadcasting, Inc. have suggested alternate sites for the Channel 228C2 upgrade at Greenville. Both of these parties have proposed sites that would require fewer of the Haltom City applicants to amend their applications. We have examined the proposed alternate sites. Both sites comply with the Commission's minimum spacing requirements. However, the site proposed by Melanie Bruton would not now require any pending applicant to amend its application.[2] Inasmuch as this new site will permit the Greenville

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[1] Channel 227C2 was allotted to Haltom City in MM Docket No. 88-196, 4 FCC Rcd 5396 (1989). That proceeding also denied a conflicting proposal by First Greenville for a Channel 228C1 upgrade in Greenville.

[2] We note that the site proposed by Bruton was originally short-spaced by 0.02 kilometers to the application by Lin-Mar Broadcasting, Inc. (File No. BPH-890921MG) and by 2 kilometers to the application filed by Tarrant County Educational Foundation (File No. BPED-890921MA). However, the Tarrant County application was dismissed in the Hearing Designation Order, 6 FCC Rcd 2508 (1991), and the Lin-Mar application was subsequently dismissed by the Administrative Law Judge for failure to prosecute. *See Order* FCC 91M-1841, released June 10, 1991.

upgrade and minimize disruption to the Haltom City application proceeding, we will grant the Channel 228C2 upgrade at the coordinates suggested by Melanie Bruton.[3]

6. In making this decision, we recognize that Section 73.208(b)(1) of the Commission's Rules only requires First Greenville to protect the reference coordinates of the Channel 227C2 allotment at Haltom City. Furthermore, none of the eleven applicants were entitled to have their individual site preferences protected by rule making petitions proposing either new services or expansions of an existing service. However, we will, to the extent possible, attempt to accommodate applicants by modifying the rule making proposal to specify an alternate site or an alternate channel. *See, e.g, Evans and Martinez, Georgia,* 4 FCC Rcd 7926 (1989). We have done so in this instance because First Greenville has already proposed to move its transmitter site 17 kilometers to meet the minimum distance separation requirements. Under these circumstances, imposing a further site restriction of only 4 kilometers should not unduly burden First Greenville and would be in accord with prior precedent. *See, e.g, Warrenton, Georgia,* 6 FCC Rcd 5174 (1991). *See also Grover City, California,* 5 FCC Rcd 1346 (1990), *Rockport, Texas,* 4 FCC Rcd 8075 (1989).

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1991,** the Table of FM Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with regard to the following community:

Community	Channel No.
Greenville, Texas	228C2

8. IT IS FURTHER ORDERED, That the license of Station KIKT, Greenville, Texas, IS MODIFIED to specify operation on Channel 228C2 subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

9. IT IS FURTHER ORDERED, That the aforementioned counterproposal filed by Lenox Broadcasting Corporation IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[3] The reference coordinates for the Channel 228C2 allotment at Greenville, Texas, are 33-17-58 and 95-52-40. We note that this site, as well as the site proposed in the *Notice,* are different from the site specified in the Station KIKT license.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-106

Amendment of Section 73.202(b), RM-7671
FM Broadcast Stations.
Table of Allotments,
(Ocracoke, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 9, 1991; Released: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Hurricane Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2074 (1991), proposing the allotment of Channel 225A to Ocracoke, North Carolina, as the community's first local FM service. Supporting comments were filed by the petitioner. No other comments were received.

2. The *Notice* requested the petitioner to provide further information to demonstrate that Ocracoke has social, economic, cultural and governmental indicia to qualify it as a "community" for allotment purposes, since it is not listed in the 1980 U.S. Census or incorporated. In response, petitioner states that Ocracoke has been recognized as a settlement since at least 1715 and was officially appointed a town in 1753. It points out that Ocracoke's economy has always been based on ocean-related activities and is presently the destination of many tourists and sport fishermen. Based on information provided by the Ocracoke Civic Club, petitioner states that Ocracoke has a number of hotels and motels, restaurants and other businesses, as well as its own churches, fire station, school and post office. Petitioner goes on to state that Ocracoke is accessible only by air or ferry. While located only 30 air miles from the county seat, Swan Quarter, petitioner contends that it is 150 road miles between the island and county seat. Such isolation, according to the petitioner, has made the local population independent and self-sustaining. Finally, petitioner states that there are no commercial broadcast stations licensed within the county and that a station is needed to provide local emergency information when hurricanes threaten the North Carolina coastline.

3. We believe the public interest would be served by allotting Channel 225A to Ocracoke, North Carolina, as it could provide the community with its first local FM service. We find that petitioner has demonstrated that Ocracoke is a "community" for allotment purposes. It has a permanent population of 650 persons, according to the 1991 Rand McNally Commercial Atlas, which is augmented by tourists. Ocracoke also has businesses which identify themselves with the community. Petitioner's comments indicate the presence of the Ocracoke Hardware Store, Ocracoke Variety Store, and Ocracoke LTD. There are municipal services including a school, a fire department and a post office with separate zip code. We believe this is sufficient to establish community status. *See Evans, Martinez and Warrenton, Georgia*, 4 FCC Rcd 7926 (1989). Channel 225A can be allotted to Ocracoke in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ocracoke, North Carolina	225A

5. The window period for filing applications will open on **December 13, 1991,** and close on **January 13, 1992.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 225A at Ocracoke are North Latitude 35-06-52 and West Longitude 75-58-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-510

In the Matter of

Amendment of Section 73.202(b), RM-6860
Table of Allotments,
FM Broadcast Stations.
(Beeville, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 9, 1991; Released: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Lovelace Associates, Inc. ("petitioner"), licensee of Station KIBL-FM, Channel 285A, Beeville, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8170 (1989), proposing the substitution of Channel 289C3 for Channel 285A at Beeville, and the modification of its license for Station KIBL-FM to specify operation on the higher powered channel. Petitioner filed supporting comments reaffirming its intention to apply for Channel 289C3 if allotted to Beeville. Brent Epperson ("Epperson"), permittee of Station KUKA-FM, Channel 290A, San Diego, Texas, filed comments and a counterproposal. Petitioner filed a Motion to Strike Epperson's counterproposal, while Epperson filed a responsive opposition. Mazal Broadcasting Company of Corpus Christi ("Mazal") filed comments supporting Epperson's counterproposal.[1]

2. We believe the public interest would be served by substituting Channel 289C3 for Channel 285A at Beeville, Texas, since it would enable Station KIBL-FM to expand its coverage area. No other party expressed an interest in use of the channel at Beeville. Therefore, in accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's license for Station KIBL-FM to specify operation on non-adjacent Channel 289C3. Channel 289C3 can be allotted to Beeville in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.8 kilometers (6.1 miles) northwest[2] to avoid short-spacings to Station KCGR-FM, Channel 288A, Portland, Texas, a construction permit (BPH-881128MA) for Station KUKA-FM, Channel 290A, San Diego, Texas, and Station KZTX-FM, Channel 291C2, Refugio, Texas.[3] Additionally, since Beeville is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Beeville, Texas	250A, 289C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Lovelace Associates, Inc. for Station KIBL-FM, Beeville, Texas, IS MODIFIED to specify operation on Channel 289C3, in lieu of Channel 285A, subject tothe following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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[1] Epperson's counterproposal was found to be technically defective pursuant to the new minimum distance separation requirements that became effective October 2, 1989 and thus was not placed on Public Notice. Epperson requested the substitution of Channel 290C3 for Channel 290A at San Diego, Texas. The requested upgrade at San Diego requires the substitutions of Channel 292C2 for Channel 291C2, Station KZTX-FM, Refugio, Texas and Channel 293A for Channel 292A, Station KPSO-FM, Falfurrias, Texas. Pursuant to the minimum distance separation requirements applicable to petitions for rule making filed after October 2, 1989, proposals involving Class A channels are examined as Class B stations with respect to Mexico. *See* Commission Rule 73.207(b)(3). Our engineering analysis of Epperson's proposal indicates that the requested substitution of Channel 293A at Falfurrias is short-spaced to vacant Channel 293A at Los Comal, Tamaulipas, Mexico by 34.5 kilometers. Therefore, Epperson's counterproposal will not be considered herein, and the responsive comments of petitioner, Mazal and Epperson will not be considered.

[2] The coordinates for Beeville are North Latitude 28-27-00 and West Longitude 97-49-51. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee of Station KIBL-FM, Channel 289C3 at Beeville may avail itself of the provisions of Section 73.213(c) with respect to Station KCGR-FM, Channel 288A, Portland, Texas, and a construction permit for Station KUKA-FM, Channel 290A, San Diego, Texas.

[3] Although Station KZTX-FM is currently operating on Channel 292A, in a separate proceeding the licence of Station KZTX-FM was modified to specify operation on Channel 291C2. *See Report and Order* in MM Docket No. 89-29, 4 FCC Rcd 7899 (1989).

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-464

In the Matter of

Amendment of Section 73.202(b), RM-7470
Table of Allotments,
FM Broadcast Stations.
(Clarendon, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 15, 1991; Released: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of John W. Lyle ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6253 (1990), proposing the allotment of Channel 295A to Clarendon, Pennsylvania, as the community's first local FM service. Comments were filed by the petitioner and Farm and Home Broadcasting Company ("Farm and Home"), to which the petitioner responded.[1]

2. Farm and Home, licensee of Station WQRM, Channel 292A, Smethport, Pennsylvania, does not object to the allotment of an FM channel to Clarendon. However, it states that the allotment of Channel 295A to Clarendon would preclude an upgrade of Station WQRM to Channel 295B1.[2] Therefore, Farm and Home requests that Channel 274A or Channel 282A be allotted to Clarendon so as to avoid a conflict between the two proposals. Because a Channel 295B1 allotment at Smethport would be short-spaced to the proposed allotment of Channel 295A to Renovo, Pennsylvania, in MM Docket No. 88-496, Farm and Home acknowledges that it could not request a Smethport upgrade in a counterproposal in this proceeding. However, Farm and Home believes that Channel 295A will not be allotted to Renovo, and because Channel 295B1 is the only adjacent higher class channel which can be allotted to Smethport, it argues that the Commission would be justified in allotting an alternate channel to Clarendon in order to preserve Station WQRM's potential for improving its service.

3. Petitioner filed comments reiterating his intention to apply for Channel 295A, if allotted to Clarendon. In reply comments, he opposes the allotment of either alternate channel identified by Farm and Home. First, petitioner argues that the Commission does not permit channels to be set aside for future upgrades, citing *Hardinsburg, Kentucky*, 5 FCC Rcd 7684 (1990). He states that the allotment process would become chaotic if channels are reserved for possible future upgrades, especially where, as here, the channel is not technically feasible at this time. Petitioner also argues that Channel 295A is preferable to either Channel 274A or Channel 282A at Clarendon. He states that Channel 295A would permit the specification of a transmitter site which could permit unobstructed and shadow-free service to Clarendon as well as to most of the other populated areas within the predicted 1mV/m contour. In addition, the site which he intends to apply for has access to commercial power, no tower height restrictions and would not require FAA approval because the tower would be less than 200 feet in height. Further, he states that Channel 295 was selected because a co-channel upgrade to Class B1 status is possible should the ultimate licensee decide to pursue such an improvement.

4. Petitioner characterizes Channel 274A and 282A as being unworkable. In support, he states that terrain and site problems would severely limit, if not foreclose, transmitter site location. According to the maps submitted by Farm and Home, petitioner states that the theoretical transmitter site areas identified by Farm and Home are mountainous with multiple peaks and steep valleys. He argues that line-of-sight service to Clarendon would not be possible because of its location in a river valley. Specifically, petitioner contends that nearly the entire area identified by Farm and Home as a possible site for Channel 274A is within the Allegheny National Forest where obtaining a transmitter site would at best be problematic. The remaining theoretical site area is also unusable, according to petitioner, because it is either at low elevations where an extremely tall transmitter tower would be required in order to provide even limited coverage to Clarendon and the surrounding area, or is without road or commercial power access. Finally, petitioner states that a station operating on Channel 274A would encounter substantial interference from first adjacent Station WMJQ at Buffalo, New York, which he states is a grandfathered "super-powered" Class B station operating with near Class C facilities of 110 kW at 408 meters HAAT.

5. Petitioner also objects to the allotment of Channel 282A, stating that the channel cannot be used at the site which he intends to apply for. In addition, he claims that much of the theoretical site area is unsuitable because of low elevations which preclude line-of-sight service. Petitioner notes that Farm and Home assumes that Channel 282A can be operated from an existing tower but contends that it has failed to show that line-of-sight coverage is possible in view of the hilly terrain. However, even if such line-of-sight service is possible, petitioner argues that use of the existing tower cannot be presumed and may not be possible. Therefore, petitioner submits that there are no suitable transmitter sites available for either Channel 274A or Channel 282A and thus the allotment of either channel would be untenable.

6. We believe the public interest would be served by allotting Channel 295A to Clarendon as the community's first local FM service. Channel 295A can be allotted to

[1] After the record closed, petitioner filed a supplement to his reply comments. However, the Commission's Rules do not contemplate the acceptance of pleadings filed beyond the comment cycle. *See* Commission Rule 1.415(d). Therefore, petitioner's Supplement to Reply Comments will not be considered.

[2] Clarendon and Smethport are located approximately 60 kilometers apart while the Commission's Rules specify a minimum distance separation for co-channel Class A and B1 allotments of 243 kilometers.

Clarendon in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3] Canadian concurrence in the allotment of Channel 295A to Clarendon has been received since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border. We do not believe that the public interest would be served by allotting either of the alternative channels identified by Farm and Home. Channel 295A at Clarendon does not conflict with any presently allotted or proposed channel. It is not Commission policy to allot alternate channels only to protect a possible future request for rule making. *See Hardinsburg, Kentucky, supra,* and *Oxford and New Albany, Mississippi,* 3 FCC Rcd 615 (1988). However, we note that even if we were inclined to consider allotting an alternate channel to avoid foreclosing the use of Channel 295B1 at Smethport, we find that a Smethport upgrade is already precluded by the allotment of Channel 295A to Renovo, Pennsylvania, pursuant to the *Report and Order* in MM Docket No. 88-496. *See* 6 FCC Rcd 4296 (1991), *recon. pending.*[4]

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clarendon, Pennsylvania	295A

8. The window period for filing applications will open on **December 13, 1991,** and close on **January 13, 1992.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[3] The coordinates for Channel 295A at Clarendon are North Latitude 41-46-48 and West Longitude 79-05-36.

[4] If Channel 295B1 can be allotted to Smethport after the petition for reconsideration in MM Docket No. 88-496 is resolved, Farm and Home may, of course, submit a petition for rule making requesting the allotment of Channel 295B1 to Smethport and an alternate channel for Clarendon.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-177

In the Matter of

Amendment of Section 73.202(b), RM-7737
Table of Allotments,
FM Broadcast Stations.
(Orland, CA)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 15, 1991; Released: October 28, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 3652 (1991), issued in response to a petition filed on behalf of Edward E. Abramson ("petitioner"), permittee of Station KXHM(FM), Channel 293A, Orland, California, requesting the substitution of Channel 294B1 for Channel 293A and modification of his construction permit to specify operation on the higher powered channel. Petitioner filed timely supporting comments in response to the *Notice* reaffirming his interest in the channel. No other comments were received.

2. We believe the public interest will be served by the substitution of Channel 294B1 for Channel 293A at Orland, California, since it would provide the community with a wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] In addition, we have authorized a modification of the petitioner's construction permit for Station KXHM(FM), Channel 293A, Orland, California, to specify operation on Channel 294B1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Orland, California	294B1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station KXHM(FM), Orland, California, IS MODIFIED to specify operation on Channel 294B1 in lieu of Channel 293A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Edward E. Abramson, permittee of Station KXHM(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 294B1 at Orland are 39-45-40 and 122-22-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-306

In the Matter of

Amendment of Section 73.202(b), RM-7824
Table of Allotments,
FM Broadcast Stations.
(Safford, AZ)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1991; Released: October 28, 1991

Comment Date: December 19, 1991
Reply Comment Date: January 6, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by P & M Broadcasting, Inc. ("petitioner"), licensee of Station KXKQ(FM), Channel 231C1, Safford, Arizona, requesting the substitution of Channel 231C for Channel 231C1 and modification of station KXKQ(FM)'s license to specify operation on the higher powered channel.[1] Petition has expressed the intention to apply for the channel if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 231C for Channel 231C1 at Safford, Arizona, which would provide a wider area FM service to that community. Channel 231C can be allotted to Safford in compliance with the Commission's minimum distance separation requirements and can be used at KXKQ's licensed site.[2] As requested, we propose to modify petitioner's authorization for Station KXKQ(FM) to specify operation on Channel 231C. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 231C at Safford or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Safford, Arizona	231C1	231C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 19, 1991,** and reply comments on or before **January 6, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Rex Jensen, President
KXKQ(FM)
Drawer L
West 8th Street
Safford, AZ 85546
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Channel 231C1 was originally allotted as a Class C station but was down-graded to a Class C1 in March 1987 when the facility was not operated as a Class C facility.

[2] The coordinates for Channel 231C1 at Safford are North Latitude 32-49-30 and West Longitude 109-45-30. Although the petitioner's licensed site is within 320 kilometers (199 miles) of the Mexican border, addtional concurrence from Mexico is not required for this proposed change in power. Mexican concurrence was originally obtained at the time of allotment for Channel 231C, prior to the station's downgrade in 1987.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-307

In re Applications of

TRI-STATE BROADCASTING (hereafter "Broadcasting") File No. BPH-901214MB

EAGLE OF IOWA, INC. (hereafter "Eagle") File No. BPH-901217ME

For Construction Permit for
a New FM Station on Channel 277C3
in Asbury, Iowa

HEARING DESIGNATION ORDER

Adopted: October 17, 1991; Released: October 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Multiple Ownership.* Eagle is the licensee of FM Station KDFX, Dubuque, Iowa. Eagle has indicated its intent to sever connections with KDFX in order to prevent duopoly overlap. Accordingly, in the event of grant of Eagle's application, Tommie R. Love, Judith A. Love and Scott M. Davis, principals in Eagle, will be required to divest and sever their connections with KDFX (FM).

3. *Financial.* Although it certified to its financial qualifications, Eagle submitted additional material which raises a substantial and material question of fact as to its financial qualifications. Specifically, Eagle noted in Section III of its application that its "Operating expenses will be covered from the existing operation of KDFX." However, in Exhibit 6, because of the above potential duopoly problem, Eagle states "Prior to commencing broadcasting operations on this application the applicant shall divest its interests in KDFX (FM). "These statements reflect an inconsistency concerning the future availability of a source of funds Eagle proposes to rely upon to finance the operation of the station. Accordingly, a financial issue will be specified.

4. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled " Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that Broadcasting and Eagle did not address the matter of how they would protect workers on their respective towers from RF radiation exposure. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since Broadcasting and Eagle failed to indicate how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. Accordingly, Broadcasting and Eagle will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the respective proposals of the affected applicants will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted with respect to those particular applicants, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

5. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Eagle whether the applicant is financially qualified.

2. If a final environmental impact statement is issued with respect to Broadcasting or Eagle concluding that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the respective proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in the event of the grant of Eagle's application, Tommie R. Love, Judith A. Love and Scott M. Davis will be ordered to divest themselves of all interests in and sever all connections with Station KDFX (FM) prior to the commencement of program test authority.

8. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, Broadcasting and Eagle shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 74 of the
Commission's Rules Regarding
FM Booster Stations

ORDER

Adopted: October 8, 1991; Released: October 28, 1991

By the Commission:

1. This *Order* amends the Commission's Rules governing operation of FM booster stations. These rules were set forth in the *Report and Order* in MM Docket 87-13[1] We take two actions designed to effectuate our intent in adopting those rules.

2. In order to clarify the applicability of restrictions placed on FM booster stations by existing international agreements,[2] we are codifying such restrictions in Section 74.1235 of the Commission's Rules. In that regard, paragraph 24 of the *Report and Order* incorrectly described the restriction as prohibiting booster stations "with ERP in excess of 50 watts within 199 miles of either the Canadian or Mexican border."[3] In fact, this limitation applies only to those stations in proximity to Mexico, and should be set at 10 watts transmitter power output (TPO) rather than 50 watts effective radiated power (ERP). Applications for FM booster stations located within 320 kilometers (199 miles) of the Mexican border will not be accepted for filing if they specify more than 10 watts TPO. Stations near the Canadian border are authorized to operate under the appropriate domestic rules, found in 47 CFR Section 74.1235. Specifically, under these requirements, applications for FM booster stations located within 320 kilometers of the Canadian border will not be accepted for filing where the predicted interference or primary service contour of the proposed booster station would extend beyond the corresponding contour of the primary FM station being rebroadcast.[4]

3. Because the rule changes relating to the limitations placed by the Mexican Agreement simply codify the existing state of international agreements to which the United States is bound, and, moreover, involve a foreign affairs function of the United States, affording an opportunity for prior public comment would serve no purpose and is unnecessary. We therefore find good cause to adopt them without prior notice and comment.[5] Similarly, prior notice and comment in the case of revising the ERP limits placed on stations near the Canadian border is unnecessary because the Commission is removing an international restriction erroneously applied and allowing the existing domestic rule to apply.

4. Paragraph 31 of the *Report and Order* reflected the Commission's decision to treat boosters in the same manner as their full service station equivalents with respect to preventing interference to stations that are 53 or 54 channels removed from the booster station.[6] That decision was not codified, however, and we now take the ministerial action of rectifying that omission. As stated in that *Report and Order*, applications for FM booster stations that are 53 or 54 channels removed from an FM radio broadcast station will not be accepted for filing if they fail to meet the required separation distances set out in Section 73.207 of the Commission's Rules. For purposes of determining compliance with Section 73.207, booster stations will be treated the same as their FM radio broadcast station equivalents. FM radio broadcast equivalents will be determined in accordance with Sections 73.210 and 73.211 of the Rules, based on the booster station's ERP and HAAT. However, booster stations operating with less than 100 watts ERP will be treated as Class D stations and will not be subject to intermediate frequency separation requirements.[7]

5. Parties with applications pending for construction of booster stations will be allowed an opportunity to amend their applications to comply with these revised spacing requirements. Those applicants choosing not to amend and whose applications do not conform to the codified provisions of Section 74.1204(g) will have their applications dismissed as unacceptable for filing. Because this action is taken in order to codify rules which we decided to adopt after a full notice and comment proceeding, we believe further proceedings would be unnecessary and contrary to the public interest. Thus, we find good cause for adoption of this rule without further notice and comment proceedings.

6. Therefore, IT IS ORDERED, THAT pursuant to Sections 4(i) and 303(b) of the Communications Act of 1934, as amended, Part 74 of the FCC Rules and Regulations IS AMENDED as set forth in the Appendix, effective **December 9, 1991.**

7. For further information on this *Order*, contact Rita S. McDonald, Mass Media Bureau at (202) 632-5414.

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[1] 2 FCC Rcd 4625 (1987).

[2] *See Agreement between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, signed November 9, 1972 (Mexican Agreement). *See also Agreement Between The Government Of The United States Of America And The Government Of Canada Relating To The FM Broadcasting Service In The 88-108 MHz Frequency Band*, 1991.

[3] 2 FCC Rcd at 4628, ¶ 24.

[4] In general, booster stations may not interfere with the signal of any existing primary or full service station, including Canadian stations in the Canadian border region.

[5] *See* 5 U.S.C. Sections 553(b)(B); 553(a)(1).

[6] *Supra* at 4630, ¶ 31.

[7] A Class D station is one operating with no more than 10 watts TPO. However, most FM boosters and translators use a transmitting antenna with sufficient gain to produce an ERP that is between two and ten times their TPO. Therefore, 100 watts ERP is the equivalent of 10 watts TPO operating with a high gain antenna.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 CFR Part 74 is amended as follows:

1. The authority citation for Part 74 continues to read as follows:

Authority: 47 U.S.C. Sections 154 and 303.

2. Section 74.1204 is amended by adding text to the end of paragraph (g), to read as follows:

Section 74.1204 Protection of FM broadcast stations and FM translators.

* * * * *

(g) * * * An application for an FM booster station that is 53 or 54 channels removed from an FM radio broadcast station will not be accepted for filing if it fails to meet the required separation distances set out in Section 73.207 of this Chapter. For purposes of determining compliance with Section 73.207, booster stations will be treated the same as their FM radio broadcast station equivalents. FM radio broadcast station equivalents will be determined in accordance with Sections 73.210 and 73.211 of this chapter, based on the booster station's ERP and HAAT. Provided, however, that FM booster stations operating with less than 100 watts ERP will be treated as Class D stations and will not be subject to intermediate frequency separation requirements.

* * * * *

3. Section 74.1235 is amended by adding new paragraphs (c)(1) and (c)(2) to read as follows:

Section 74.1235 Power limitations and antenna systems.

* * * * *

(c) * * *

(1) Applications for FM booster stations located within 320 kilometers of the Mexican border will not be accepted for filing if they specify more than 10 watts transmitter power output.

(2) Applications for FM booster stations located within 320 kilometers of the Canadian border will not be accepted for filing where the predicted interference or primary service contour of the proposed booster station would extend beyond the corresponding contour of the primary FM station being rebroadcast.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-605

In the Matter of

Revision of Parts 15 and 68 of the Commission's rules regarding cordless telephones — RM-6537

MEMORANDUM, OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1991; Released: October 28, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission denies a Petition for Limited Reconsideration of the *Report and Order* (*R&O*) in this proceeding filed by Unisonic Products Corporation. The petitioner requests reconsideration of the transition provisions in the *R&O* that require the importation of cordless telephones without digital security coding to cease by September 12, 1991.[1] The Commission finds that the six-month transition period specified in the *R&O* is appropriate and necessary to reduce the harm being caused by cordless telephones without security coding to the "911" Emergency Services Telephone System and to the telephone network in general.

BACKGROUND

2. Security coding is a cordless telephone feature for preventing unauthorized access of the telephone line, the dialing of calls in response to signals other than those from the matching handset, and unintentional handset ringing. In the *R&O* in this proceeding, the Commission found that cordless telephones that do not incorporate security coding are causing interference to the public switched telephone network and also are adversely affecting the "911" Emergency Services Telephone System. Problems typically occur when such telephones respond to random radio noise bursts and signals from other cordless telephones on the same channel and, in turn, generate random hook switch closures that are interpreted by the telephone network as dialing sequences. This tends to result in telephone line seizures, some instances of which have nearly overloaded telephone central office equipment, and in the false dialing of "911" emergency services and other customers who have low-digit telephone numbers.

3. In the *R&O*, the Commission noted that the marketplace had already had seven years to respond to the problems caused by cordless telephones without security coding. However, it observed that only half of the 10 million cordless telephones sold each year have any type of security coding features. The Commission also determined that the costs of security coding were minimal. Thus, the Commission found it in the public interest to establish mandatory requirements for security coding for cordless telephones. To provide a transition period for development and/or modification of cordless telephone equipment to comply with the new security coding requirements, the Commission permitted the manufacture and importation of cordless telephones without security coding until September 12, 1991.[2] The Commission observed that the technology needed to comply with the new rules was already available and that a number of cordless telephones currently on the market include security coding features.

THE UNISONIC PETITION

4. Unisonic Products Corporation (Unisonic) is an importer of cordless telephones and other electronic consumer products. It requests that the Commission interpret the transition provisions of Section 15.37(e) as not being applicable to cordless telephones for which contracts were executed, or orders placed and in process, before March 11, 1991, the effective date of the *R&O*.[3] Unisonic indicates that it had contracted, prior to the January 25, 1991 release of the *R&O*, to purchase cordless telephones without security coding from foreign manufacturers and to sell them to retailers for the 1991 Christmas season. To meet its contracts, Unisonic seeks to import these cordless telephones until mid-November 1991, which is beyond the expiration of the transition period. It states that it was aware that the need for security coding was under consideration and that there was a strong likelihood that new requirements would be adopted. However, Unisonic argues that it had no way of knowing when the Commission would make the new requirements effective. It points out that the *NPRM* in this proceeding proposed a one-year transition period.

5. In support of its request, Unisonic indicates that it takes a year to 18 months for suppliers to add features such as security coding. Unisonic argues that companies like itself, as well as retailers and the consuming public, will be adversely affected by the transition provisions since cordless telephone prices will have to increase by $6 to $12 per unit to provide security coding. Such increases, it alleges, may suppress retail sales in 1991 and, therefore, add to the financial difficulties many retailers are having. Unisonic also argues that existing contracts and investments will be seriously disrupted unless its request is granted. It further suggests that the Commission's Regulatory Flexibility Analysis in this proceeding was deficient since it overlooked the impact of the requirements on importers, retailers, and consumers. There were no comments filed in response to Unisonic's petition.

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[1] *See Report and Order*, GEN Docket No. 89-605, adopted January 8, 1991, 6 FCC Rcd 427 (1991).

[2] *See* 47 CFR Section 15.37(e).

[3] Unisonic also filed a Petition for Limited Waiver of those portions of the rules addressed herein, which the Chief Engineer denied under delegated authority.

DISCUSSION

6. We find Unisonic's arguments in support of its request to be unpersuasive. While the *Notice of Proposed Rule Making* (*Notice*) in this proceeding contemplated a one-year implementation period, comments were invited on whether this was an appropriate length of time.[4] Based on the comments, the Commission determined that a shorter implementation period was warranted in light of the potential for interference to the telephone network and disruption of "911" emergency services. Notwithstanding the *Notice*, Unisonic chose to enter into long-term contracts to supply cordless telephones without security coding. Unisonic does not suggest that it sought and was unable to obtain or contract for cordless telephones that included security coding. Thus, Unisonic's contract situation arises from risks it chose to accept. We do not, under these circumstances, find Unisonic's business decisions to be an adequate justification to delay implementation of the security coding requirements.

7. Contrary to Unisonic's assertions, the Commission fully considered the impact of its decision to require security coding. The Commission determined that the costs of implementing security coding were justified by the benefits. Unisonic's cost estimates are not inconsistent with the information already considered in this proceeding. We reject Unisonic's argument that additional time is needed to redesign cordless telephones. As the Commission observed in the *R&O*, security coding technology has been available for some time in a significant portion of the cordless telephones already on the market. Including this technology in all units does not pose any significant new design requirement. We note that no cordless telephone manufacturers filed comments supporting Unisonic's petition. Accordingly, we conclude that our original decision regarding the transition provisions was correct and that Unisonic's petition should be denied.

ORDERING CLAUSES

8. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304 and 307 of the Communications Act of 1934, as amended, IT IS ORDERED that the Petition for Partial Reconsideration of the *Report and Order* filed by Unisonic Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] *See Notice of Proposed Rule Making*, GEN Docket No. 89-605, adopted December 11, 1989, 4 FCC Rcd. 8808.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-402

In re Applications of

HELEN BROADCASTERS, INC. File No. BPH-890426MI

ANTHONY LAMAR CANUP and GEORGE M. PASS d/b/a WHITE COUNTY BROADCASTING File No. BPH-890427ME

For Construction Permit for a New FM Station on Channel 286A in Helen, Georgia

Appearances

Richard Hildreth and *Anne Goodwin Crump*, on behalf of Helen Broadcasters, Inc.; *Lawrence J. Bernard, Jr.*, on behalf of Anthony Lamar Canup and George M. Pass d/b/a White County Broadcasting; and *Gary P. Schonman*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: October 22, 1991; Released: October 28, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the two remaining mutually exclusive applications for authority to construct and operate a new FM broadcast station on Channel 286A at Helen, Georgia. The issues to be decided are:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

An issue to determine whether there is a reasonable possibility that the tower heights and locations proposed by Helen Broadcasters, Inc. (HBI) and Anthony Lamar Canup and George M. Pass d/b/a White County Broadcasting (WCB) would constitute hazards to air navigation was specified by the *Hearing Designation Order*, 5 FCC Rcd 5642 (M. Med. Bur. 1990), but this issue was resolved favorable to both applicants by *Order*, FCC 91M-91, released January 10, 1991.

2. The prehearing conference was held on November 29, 1990. The hearing session was held on February 19, 1991. The record in the case was closed on February 19, 1991. Tr. 170. Subsequently, the record was re-opened, HBI Exhibit 4 was received into evidence, and the record was re-closed by *Order*, FCC 91M-932, released March 13, 1991. Proposed findings of fact and conclusions of law were filed April 16, 1991; replies were filed April 30, 1991.

FINDINGS OF FACT

Helen Broadcasters, Inc.

3. *Background*. HBI is a Georgia corporation. HBI Ex. 1 at 1. The corporation has one class of stock, and 1,000 shares are authorized. *Id.* Of those, 100 shares are issued and outstanding. *Id.* Charles A. Smithgall is HBI's sole stockholder and sole director. *Id.*; Tr. 96-97. He also is the President of HBI. His wife, Celestia B. Smithgall, is the Secretary and Treasurer. HBI Ex. 1 at 1. There are no other corporate officers. *Id.*; Tr. 96.

4. HBI was originally incorporated on April 21, 1989. HBI Ex. 1 at 1. At that time, Mrs. Smithgall owned 25 percent of the stock and was Secretary and Treasurer of HBI. *Id.* Subsequently, Mrs. Smithgall told Mr. Smithgall that she had found that she could not commit herself to full-time participation in the management of the proposed Helen station because of other obligations. Tr. 66, 93. Therefore, Mr. Smithgall became the 100 percent stockholder of HBI. Tr. 66, HBI Ex. 1 at 1. Mrs. Smithgall remained Secretary and Treasurer of HBI, however. HBI Ex. 1 at 1.

5. *Integration*. Upon a grant of the construction permit to HBI, Mr. Smithgall will serve as the full-time General Manager of the proposed HBI station. HBI Ex. 2 at 1. He will work on station affairs on a daily basis, and he will devote at least 40 hours per week to his position as General Manager. *Id.* Indeed, for the first month or two, Mr. Smithgall expects that he may work 60 hours per week at the station. Tr. 124. After that time, Mr Smithgall plans to continue to work at least 40 hours per week. Tr. 124, 156. Mr. Smithgall anticipates that his work with the station will include such activities as signing the station on the air, writing copy, hiring personnel to assist and teaching them to write copy, selling advertising time, going to Atlanta and Gainesville to get regional business, contacting merchants in Helen, doing local newsgathering, and attempting to cultivate interest in gathering local news. Tr. 122. When Mr. Smithgall goes to Atlanta, he plans to call on advertising agencies to seek business from national advertisers located in Atlanta, such as the Coca-Cola Company. Tr. 125-126. There is nothing at the station that Mr. Smithgall can conceive of that he will not do. Tr. 156.

6. Mr. Smithgall plans to have four full-time staff members who will have to double in brass as annoucers. Tr. 126. These will include someone to do programming, a bookkeeper, and a copywriter and salesman, plus a part-time engineer. Tr. 123. Mr. Smithgall will be responsible for hiring and supervising all of the staff members. HBI Exhibit 2 at 1. Mr. Smithgall also will select and hire contractors during the construction phase and will supervise the implementation of the station's equal employment opportunity program. *Id.* After the station becomes established, Mr. Smithgall will work to make it better, spending at least 40 hours per week working on station affairs. Tr. 125, 128.

7. Through Helen Broadcasters, the predecessor in interest of HBI, Mr. Smithgall was the sole party who sought allotment of Channel 286A to Helen as its first local service and was the only party who filed comments in support of the allotment. HBI Ex. 2 at 3. Mr. Smithgall petitioned for rule making to have a channel placed at Helen in order to provide a broadcast outlet for Helen, which has no other communications media, to discuss the events which take place in the town. Tr. 147-148. Mr. Smithgall is interested in operating a station at Helen because he enjoys living in Helen and calls it "the most beautiful spot in the country." Tr. 129. With regard to Helen, Mr. Smithgall further testified: "I love it. It's quiet and I'm tired of the rat race." *Id.* Mr. Smithgall also is motivated to operate the small station at Helen because broadcasting as a disc jockey was his "first baby." Tr. 130.

8. Mr. Smithgall is retired, and he has no commitments outside of Helen. HBI Ex. 2 at 1; Tr. 125. If he should acquire other employment, he will terminate that employment prior to the commencement of program tests on HBI's proposed station. HBI Ex. 2 at 1. Mr. Smithgall has an office in Atlanta which oversees his finances (Tr. 143-144) and an office in Gainesville, Georgia, which acts as a clearinghouse for him and his wife (Tr. 150-151), but he does not spend any time supervising the staff at either office. Tr. 149.

9. Over the past several years, Mr. Smithgall has had a conservation and re-forestation project on land he owns adjacent to Helen at an area known as Dukes Creek Woods. HBI Ex. 2 at 5. The purpose of the Dukes Creek Woods project is to promote the ecology. Tr. 138. Mr. Smithgall does not directly supervise the employees at Dukes Creek Woods and never has done so. Tr. 153, 164. Work on the project is winding down now. Tr. 40. The project is at the verge of maturity. Tr. 145. Mr. Smithgall expects his staff at Dukes Creek Woods to decrease in the future. Tr. 98. At present, Mr. Smithgall works about an hour a week on nuts and bolts matters connected with the project, such as maintaining the fire lanes and completing a fence. Tr. 127. Otherwise, the only other time Mr. Smithgall spends is simply riding around the project or walking on the land. Tr. 128, 146. Mr. Smithgall would like to acquire one more small piece of land located in the middle of his Dukes Creek Woods project if it ever become available, but the process of acquiring this land would take very little time. Tr. 146-147.

10. Mr. Smithgall currently owns and resides at a house which lies just outside of the town limits of Helen and is located on a large tract of land which includes some acreage within the town limits of Helen. HBI Ex. 2 at 4. Mr. Smithgall first visited the area of Helen and Dukes Creek about 50 years ago, and he has been visiting there regularly for about 30 years. HBI Ex. 2 at 4; Tr. 138. He purchased a house and 210 acres of land near Helen on Tray Mountain in 1968, but eventually moved to the Dukes Creek area. Tr. 138-139. Mr. Smithgall first built houses on his Dukes Creek Wood property in the early 1980's. Tr. 139. The first house built was the "guest house." *Id.* Mr. Smithgall used this house as a personal residence beginning in 1982 or 1983. *Id.* The next house built was the caretaker's house, which Mr. Smithgall did not use. Tr. 140. Mr. Smithgall built a second "caretaker's" house, the upper creek house, and moved into it about 1985. *Id.* The foundation for Mr. Smithgall's current home was built at about the same time as the upper creek caretaker's house. *Id.* The construction itself was a long-term project which occupied about three years. Tr. 141. This house was completed for all practical purposes in November 1990. Tr. 29.

11. Mr. Smithgall moved to Helen by degrees. Tr. 48. Over the years, the amount of time he spent there gradually increased to the point that he began to consider himself a resident of Helen. *Id.*; HBI Ex. 2 at 4-5. In April 1989, Mr. Smithgall considered Helen to be his legal residence. Tr. 149. At the time that HBI's application was filed, the upper creek caretaker's house was Mr. Smithgall's residence. Tr. 51. Also at that time, Mrs. Smithgall was working on the decorating and furnishing of the principal residence. Tr. 67.

12. Mr. Smithgall also has spent time in the past at a residence in Gainesville owned by Mrs. Smithgall and in living quarters in Atlanta. Tr. 41. By April of 1989, however, Mr. Smithgall considered Helen to be his legal residence and the locations in Atlanta and Gainesville to be mailing addresses. Tr. 149-150. At the time that the HBI application was filed in April 1989, it was Mr. Smithgall's intention to continue to live in Helen. Tr. 78, 80. Mr. Smithgall estimated that he spent about 150 nights in Helen during 1989. Tr. 148. He also estimated that he spent about the same amount of time there in 1990 as he did in 1989. Tr. 54. Mr. Smithgall spent more time in Helen than in either Gainesville or Atlanta. Additionally, in 1989 and 1990, even when Mr. Smithgall spent a night in Gainesville, he drove up to Helen and spent the day. Tr. 52, 80. Gainesville is about 30 miles from Helen. Tr. 52, 97-98. In the past, Mr. Smithgall also has gone from Helen to Atlanta on Fridays, gone back to Helen on Saturdays. Tr. 63-64. Atlanta is about 80 miles form Helen. Tr. 97. Mr. Smithgall intends to spend nearly all of his time in Helen in 1991. Tr. 153. If HBI is granted the construction permit in this proceeding, Mr. Smithgall will continue to reside in Helen. *Id.*

13. Mr. Smithgall has changed his voter registration to White County, the county in which Helen is located. Tr. 81. In November 1990, Mr. Smithgall also changed the address on his driver's license to his Helen address. *Id.* This came about after Mr. Smithgall had a conversation with Mr. Junior Tow during which Mr. Tow told Mr. Smithgall that for insurance purposes he ought to have his real address on his driver's license and after which Mr. Smithgall understood that it might be illegal to have an address on his driver's license which was not considered to be his residence. Tr. 56, 83. Mr. Tow is the White County Tax Commissioner. HBI Ex. 2 at 7. Mr. Smithgall did not discuss changing the address on his driver's license with counsel before making the change. Tr. 83. While telephone records exchanged in discovery indicate that Mr. Smithgall made some calls concerning the HBI application from Atlanta and Gainesville (Tr. 77-78), he also made a number of calls regarding the application from Helen. Tr. 74-75; HBI Ex. 4. Statements for legal and engineering fees were sent to Gainesville or Atlanta because these are the offices from which funds are distributed. Tr. 85-86.

14. Mr. Smithgall has gained considerable familiarity with the area around Helen through his conservation and re-forestation project at Dukes Creek Woods. HBI Ex. 2 at 5. This project got underway in the early 1980's. *Id.*; Tr. 137. At that time, Mr. Smithgall bought a piece of land in the immediate vicinity of Helen. *Id.* Through a series of purchases, Mr. Smithgall came to own about 5,500 acres and became the second largest landowner in White Coun-

ty, ranking only after the United States Forest Service. HBI Ex. 2 at 5; Tr. 30. After selling his other buinessses in the early 1980's, Mr. Smithgall devoted his full time and attention to assembling the land for the project and putting the project together. HBI Ex. 2 at 5; Tr. 34. This process has now been completed. Tr. 34.

15. The goal of the Dukes Creek Woods project is to restore the forest to the condition of a mature hardwood forest inhabited by varied wildlife. HBI Ex. 2 at 5. Mr. Smithgall has worked with the Georgia Conservancy and the National Conservancy in developing his project. Tr. 37. Mr. Smithgall has re-forested some of the land and planted trees on former crop land. Tr. 100. It is his hope that the presence of these trees will help to attract and support wildlife in the area. HBI Ex. 2 at 6.

16. As a part of this process, there are logging operations which are designed to clear the woods of "weed trees." Tr. 131. These operations must be conducted carefully so as not to kill the younger trees. Tr. 132. In 1985, Mr. Smithgall hired Howard Page from Montana to supervise the logging and reforestation portions of the project. HBI Ex. 2 at 5. Forestry Service personnel had recommended to Mr. Smithgall that he use horse logging rather than conventional machinery to avoid damaging the trees that were to be preserved and had suggested that Mr. Smithgall contact Mr. Page. *Id.* at 5-6. The horse logging operation is not a commercial venture and, indeed, is not self-sustaining. *Id.* at 6; Tr. 131. The logging operation has produced in revenue only about 40 or 50 percent of the cost of the operation. *Id.*

17. Another part of Mr. Smithgall's project has been to develop a wildlife management plan with the guidance of the Georgia Department of Natural Resources. HBI Ex. 2 at 6. Mr. Smithgall has worked to clear Dukes Creek of silt and to create an attractive habitat for wildlife. Tr. 35. Mr. Smithgall also has worked with the state Fish and Game Division to adopt a trout management plan to make Dukes Creek a trophy stream of native trout, including rainbow trout. HBI Ex. 2 at 6; Tr. 138. Mr. Smithgall's efforts have included planting trees and shrubs in the open land along the creek to shade and cool the water as well as to prevent erosion. HBI Ex. 2 at 6. He also has put beds of gravel in the creek to prevent silt from entering the creek in order to provide a better habitat for trout spawning. *Id.* Additionally, Mr. Smithgall's Dukes Creek Woods project has led to the removal of tons of trash and debris from the creek area and forest, much of which had been left by earlier campers. *Id.*

18. Since about 1980, Mr. Smithgall has spent over $12,000,000 of his personal funds in the Dukes Creek Woods project and improvements to the land. Tr. 31. At the time of the execution of his direct case exhibits, Mr. Smithgall had about twelve employees working on the project. HBI Ex. 2 at 7; Tr. 331-332. Subsequently, the number diminished somewhat. Tr. 32. Mr. Smithgall has paid the salaries for the staff from his personal funds. HBI Ex. 2 at 7.

19. Mr. Smithgall now plans to let his project mature, just as it is. Tr. 101. The Dukes Creek Woods staff received their last batch of trees for the project in the Fall of 1990 and recently finished planting them. *Id.* Any further planting of trees would be minimal. *Id.* Mr. Smithgall estimates that it will take many years for the project to go through a complete cycle and return the forest as nearly as possible to its original timber species mix. HBI Ex. at 6. While Mr. Smithgall does not anticipate that his efforts to rebuild the forest will have reached their full fruition during his lifetime, he hopes that future generations will enjoy the benefits of the project. *Id.* Mr. Smithgall has agreed to open his land to one group, the Natural Science for Youth Foundation, which is led by a person whom Mr. Smithgall knows to be a conservationist. HBI Ex. 2 at 5; Tr. 37. Mr. Smithgall plans to open his land to other such organizations in accordance with the guidelines of the National Conservancy. Tr. 37.

20. Through Mr. Smithgall's work on his Dukes Creek Woods project, he has become acquainted with city, county, and state officials in the Helen area and has sought their suggestions and directions in making the project meaningful to Helen and the surrounding area. HBI Ex. 2 at 7. These persons have included: Hue Rainey, Major of Helen; David Wilkins, Vice-Mayor of Helen; Jeff Ash, member of the Helen City Council; Jim Whitford, City Manager of Helen; Gene Westmoreland, Chairman of the County Commission of White County; James Morris and Harry Mays, current County Commissioners; Vernon McGee and Adrian Howard, former County Commissioners; Harry Barton, Field Representative for the White County Planning Commission; Junior Tow, White County Tax Commissioner; James Palmour, current County Attorney; Frank Baker, Jr., White County Sherriff; and Ron Cantrell, Lamar Black, and Joe Vandegriff, all Directors of the White County Chamber of Commerce. *Id.*

21. Mr. Smithgall is a member of the Helen Chamber of Commerce and the White County Chamber of Commerce. Tr. 116. He has been a member of both organizations for about a year or less. *Id.*

22. Mr. Smithgall, who is 80 years old, began his career in broadcasting while he was a student at the Georgia Institute of Technology (Georgia Tech). HBI Ex. 2 at 1. While a student, he served as technician, announcer, and producer of programs which were broadcast on Georgia Tech's station, WGST(AM), Atlanta. *Id.* From his graduation in 1933 until 1936, Mr. Smithgall filled the positions of technician, announcer, program director, and assistant manager of WGST. *Id.* at 1-2. Mr. Smithgall then moved to WSB(AM), Atlanta, where he served as farm director, morning program personality, and assistant to the manager. *Id.* at 2. He worked at WSB from 1936 to 1940. *Id.* In 1940, Mr. Smithgall assumed the position of radio director at Burton E. Wyatt & Co., an advertising agency, and remained there until 1942. *Id.*

23. Meanwhile, Mr. Smithgall founded and built Station WGGA(AM), Gainesville, Georgia. *Id.* Originally, Mr. Smithgall had been part of a group of investors that had sought the construction permit for the station, but he bought out the rest of the group and put WGGA on the air in 1941. *Id.* Mr. Smithgall also served as the station's first general manager. *Id.*

24. In 1942, Mr. Smith joined Storer Broadcasting Company (then known as Fort Industries) as general manager of radio station WAGA in Atlanta. *Id.* He subsequently was elected to the Board of Directors and as a member of the Executive Committee of this company. *Id.* Prior to this executive position, Mr. Smithgall conducted a morning program over WAGA and also supervised the operations of WAGA and WGBS(AM), Miami. *Id.* Mr. Smithgall remained with Storer Broadcasting Company through 1946. *Id.*

25. In the early 1950's Mr. Smithgall acquired a 60 percent interest in Station WRGA-AM, Rome, Georgia. *Id.* Mather Payne owned the other 40 percent interest at that time. *Id.* Mr. Smithgall and Mr. Payne subsequently added WRGA-FM. *Id.* Both stations were sold in 1972. *Id.*

26. Mr. Smithgall and Mr. Payne acquired WAAX-AM, Gadsden, Alabama, in 1955, and, in 1973, they added WQEN-FM, Gadsden. *Id.* Mr. Smithgall employed a manager at Gadsden, but Mr. Smithgall helped the manager. Tr. 121. Both of the Gadsden stations were sold in 1984. HBI Ex. 2 at 2-3.

27. After acquiring a construction permit for a new AM station, Mr. Smithgall put Station WRNG (now WCNN), North Atlanta, on the air in 1967. *Id.* at 3. At that time, Mr. Smithgall was forced to sell WGGA, Gainesville, because of overlap which was in violation of the multiple ownership rules. *Id.* Mr. Smithgall worked on a day-to-day basis at running WRNG until the early 1970's. Tr. 119-121. Mr. Smithgall served as the initial general manager of WRNG. Tr. 158. Mr. Smithgall sold his interest in WRNG to his son, Charles A. Smithgall, III, in 1982, fifteen years after the station went on the air. HBI Ex. 2 at 3.

28. Mr. Smithgall was the president and a director of the Georgia Association of Broadcasters in 1957. *Id.* He received an award as a Pioneer of Georgia Broadcasting in 1961. *Id.*

29. *Diversification.* Neither HBI nor either of its principals has any interest in any broadcast property or other media. WCB Ex. 8 at 1.

30. *Auxiliary Power.* HBI proposes to install auxiliary power generating equipment at its transmitter and at its studio to ensure the proposed station's continued operation in the event of any emergency condition causing an interruption in the normal supply of electrical power. HBI Ex. 3 at 1.

WHITE COUNTY BROADCASTING

31. *Background.* WCB is a general partnership with two general partners, Anthony Lamar Canup and George M. Pass. WCB Ex. 2 at 1. Each of the partners owns and votes a 50 percent interest in the applicant.

32. *Integration.* Messrs. Canup and Pass propose to jointly establish policies for WCB's station in all areas, including financial, programming, and sales. *Id.* They also propose to make jointly all personnel decisions on the hiring, training, promotion, severance, and rates of pay for station employees. *Id.*

33. Mr. Pass proposes to work at WCB's proposed station on a daily basis for at least 40 hours per week as the general manager. *Id.* In this capacity, he would direct and supervise all non-sales department functions of the station, including programming, clerical/bookkeeping, and engineering. *Id.*

34. Mr. Pass currently has an existing business of providing contract engineering services to various stations. *Id.* at 2. He proposes to close this business prior to the time that WCB's proposed station woud begin operations. *Id.*

35. Mr. Canup previously proposed to work at WCB's proposed station on a daily basis for a total of at least 25 hours per week as the station's sales manager. *Id.* at 1. WCB has now withdrawn that proposal, however.[1] Therefore, WCB claims no integration credit for Mr. Canup's proposed activities at WCB's proposed station.

36. *Diversification.* Neither WCB nor either of its partners has any ownership interest in any existing medium of mass communications. WCB Ex. 1. Mr. Pass now owns a contract engineering business which provides technical services to radio stations, but he would close this business prior to the time that WCB's proposed station would begin operations. *Id.* Mr. Canup does not have any connection with any medium of mass communications. *Id.*

37. *Auxiliary Power.* WCB proposes to install auxiliary power generators at both its studio and its transmitting facilities in order to permit continued operation of the proposed station in the event of an interruption in power supply. WCB Ex. 2 at 2.

COMPARATIVE COVERAGE

38. HBI and WCB jointly stipulated that the differences between the sizes of the areas and populations which would receive service from the proposals of HBI and WCB are insubstantial and thus are not decisionally significant under Issue Number 2, the standard comparative issue, in this proceeding. Joint Ex. 1 at 2.

CONCLUSIONS

39. HBI is the comparative winner over WCB. Neither HBI or WCB have media interests and are equal under the diversification criteria. However, HBI is the only applicant entitled to 100% full-time integration credit. WCB only claims 50% full-time integration credit. Commission precedent establishes that a difference in quantitative integration credit of this magnitude is a sufficiently clear quantitative difference that there is no need to consider qualitative enhancement factors. *Miracle Strip Communications*, 4 FCC Rcd 5064, 5066 (1989). In any event, consideration of qualitative enhancement factors would only serve to widen the gap that separates WCB from HBI.

40. WCB argues that all applicants must demonstrate how its principals will accommodate their other business interests and that HBI has failed to account for alleged other demands on Mr. Smithgall's time. While WCB's premise that other "demands" must be accounted for is valid, its attempt to create an argument that Mr. Smithgall has any such demands on his time wholly lacks any basis in fact. Mr. Smithgall is retired and is in full control of his destiny. There are no "demands" on him except those he wishes to impose on himself, and the only such demand is his intention to manage and operate the HBI station. WCB first attempts to argue that Mr. Smithgall's Dukes Creek Woods project is a "business interest" that places demands on his time which would interfere with his integration commitment. This argument finds no support in the record. First, the Dukes Creek Woods project does not constitute employment or a business interest. Rather, the purpose of the Dukes Creek Woods project, which has just about been completed in any event, is to promote the ecology. Even the horse logging operations that are conducted are not a commercial venture but are merely designed to clear away undesirable trees. Clearly, this project is not any sort of business enterprise, but rather is a labor of love that Mr. Smithgall has undertaken in the hopes of improving the ecology for future generations of Helen residents.

41. WCB further asserts that Mr. Smithgall's involvement in his Dukes Creek Wood project will interfere with his commitment to work full-time at HBI's station and

that HBI has not provided a "reasonable" estimate of the amount of time that Mr. Smithgall will spend on the project. This argument flies in the face of record testimony. Mr. Smithgall spends only about one hour per week working on the project. The record further reflects that work on the project is winding down, as the project is at the edge of maturity. WCB provides nothing to cast any doubt on Mr. Smithgall's ability to effectuate his integration proposal.

42. WCB also argues that Mr. Smithgall's trips to Atlanta will interfere with his integration commitment. WCB ignores, however, the fact that future trips to Atlanta will be on station business and for the primary purpose of seeking advertising from regional and national advertisers and advertising agencies who wish to reach listeners in the Helen area. Travel activities such as these are related to station business and thus are fully consistent with the duties of a full-time general manager. *TRC Communications, Inc.*, 59 RR 2d 92 (Rev. Bd. 1985), *review denied* RCC 86-283, released June 9, 1986. Moreover, the Commission has fully credited a proposal to work full-time when the interested principal candidly stated that he would be in the community of license only Monday through Friday and would spend the weekends elsewhere. *Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721 (1991). Therefore, even if Mr. Smithgall's potential trips to Atlanta were not related to station business, they would not detract from his integration proposal. The similarity to the principals in *Anchor Broadcasting* is especially marked when it is recalled that Mr. Smithgall's current practice is to travel to Atlanta at the end of the week.

43. WCB's reliance on *Mid - Ohio Communications, Inc.*, 67 RR 2d 1743 (1990) is misplaced. The activities which the Commission found to discredit an integration proposal in *Mid - Ohio Communications* are easily distinguished from Mr. Smithgall's station-related activities. In *Mid - Ohio Communications*, the Commission found that time spent away from a station and primarily involved in another business could not be considered time spent managing the station. In sharp contrast, any trips Mr. Smithgall may make to Atlanta will be for the express purpose of furthering station business.

44. WCB attempts to argue that Mr. Smithgall cannot be relied upon to carry out his integration pledge on an indefinite basis because he will devote full-time until he can train his employees, and then his own participation will diminish. This conclusion is not supported by the record. The record reflects that Mr. Smithgall, who has an extensive background in station operations, plans to train his employees, but these employees will not replace him but will merely supplement him. Mr. Smithgall stated, a year after the station begins operation, he intends to continue working at least 40 hours a week. WCB has offered no evidence which undermines Mr. Smithgall's stated intention. The fact that Mr. Smithgall is not certain today of the precise times at which he will arrive at and depart from the station or of the exact identities of his future employees is of no moment. Furthermore, WCB's assertion that Mr. Smithgall is more interested in non-managerial duties than in managerial duties is unsupported speculation which finds no basis in the record. Suffice it to say an owner/general manager of a station with only four full-time employees will necessarily be fully involved with managerial duties.

45. WCB also attempts to find some significance in its unsupported assertion that HBI's records currently are kept in Atlanta or Gainesville. It must be remembered, however, that at this time, the sum total of HBI's business is its application. There is no operating radio business in Helen. Obviously, where HBI's corporate documents happen to be stored now has no bearing on where its records will be kept once it begins operating a station in Helen. Moreover, Mr. Smithgall referred in his testimony to his plan to move his office to Helen. Clearly, therefore, WCB's argument that Mr. Smithgall will be required to be away from Helen to review HBI's records is not persuasive. In sum, WCB's various arguments fail to diminish HBI's entitlement to 100% full-time integration credit and the grant of its application.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[2] the application of Helen Broadcasters, Inc. for a construction permit for a new FM Station on Channel 286A at Helen, Georgia IS GRANTED; and the application of Anthony Lamar Canup and George M. Pass d/b/a White County Broadcasting IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Official notice is taken of the WCB filing of April 10, 1991, to that effect.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1543

Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: October 10, 1991; Released: October 11, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On July 17, 1991, Pacific Bell filed Transmittal No. 1543 to introduce Common Channel Signaling Access Capability (CCSAC) -- out-of-band signaling via its Signaling System 7 (SS7) network -- as a nonchargeable option under Feature Group D (FGD) Switched Access service. Pacific Bell will also offer Calling Party Number (CPN), Charge Number, and Carrier Selection Parameter as nonchargeable optional features when CCSAC is ordered. However, CPN will not be made available until after the California Public Utilities Commission (CPUC) acts on Pacific Bell's request to provide Caller ID on an intrastate basis. Description and Justification (unnumbered pages). The tariff is scheduled to take effect on October 15, 1991.

2. On July 31, 1991, MCI Telecommunication Corporation (MCI) filed a petition to suspend and investigate Transmittal 1543, and on August 1, 1991, American Telephone and Telegraph (AT&T) filed a petition to reject in part. Both parties argue that the restriction on CPN is unreasonable because it conditions the provision of interstate service on the decision in a state regulatory proceeding. AT&T Petition at 2; MCI Petition at 5. AT&T notes that in allowing Bell Atlantic to withhold interstate CPN in Pennsylvania, the Bureau stated that it was concerned about limitations on the provision of interstate CPN and would be considering that issue in the future; AT&T states that the Bureau should include the Pacific Bell restriction on CPN in that consideration. AT&T Petition at 4-5.[1]

3. MCI also makes three other arguments against Transmittal 1543. First, MCI asks for the ability to link its SS7 network to the local exchange carrier's (LEC's) SS7 network without having to go through the signaling transfer point (STP). MCI Petition at 2. Second, MCI requests that LECs make out-of-band signaling available with Feature Group B (FGB). *Id.* at 3. Finally, MCI complains that there are no industry approval or endorsement mechanisms for the Pacific Bell technical documents referenced in the tariff, and thus the technical requirements can be changed at Pacific Bell's whim. *Id.* at 4.

4. In its reply comments, filed on August 12, 1991, Pacific Bell contends it is not advocating that the CPUC has jurisdiction over interstate calls. Rather, Pacific Bell states that making CPN available on an interstate basis while withholding Caller ID on an intrastate basis would be confusing to its customers and would present many technical problems, including trying to split FGD traffic between jurisdictions. Pacific Bell Reply at 6-7. Regarding MCI's other arguments, Pacific Bell contends that there are several reasons for not allowing direct connection to its SS7 network, including the lack of industry standards for such interconnection. *Id.* at 2. Pacific Bell also notes that it has an ongoing nondisclosure agreement with MCI, and under the terms of that agreement it has provided MCI with all of Pacific Bell's technical documents relating to SS7 interconnection issues. *Id.* at 4. Finally, Pacific Bell states that it is not offering out-of-band signaling with FGB because it is not technically feasible at this time. *Id.*

5. The Common Carrier Bureau has reviewed Pacific Bell Transmittal No. 1543, the AT&T and MCI petitions, and Pacific Bell's reply. The restriction on the Calling Party Number offering raises issues of concern to the Bureau. Those issues are broader than the instant transmittal, however, and will be considered by the Commission in Docket 91-281.[2] Therefore, we conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that no question has been raised which warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to reject in part filed by American Telephone and Telegraph Company, and the petition to suspend and investigate filed by MCI Telecommunications Corporation against Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1543, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] *Citing* Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Transmittal Nos. 410 and 428, 6 FCC Rcd 2907 (Com. Car. Bur. 1991).

[2] Petition for Rulemaking to establish uniform, nationwide rules for calling number delivery, CC Docket 91-281, FCC No. 91-300 (adopted Sept. 26, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 18, 1991

COMMENT DATES ESTABLISHED

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS SEEKS NOTICE OF INQUIRY ADDRESSING ADMINISTRATION OF THE NORTH AMERICAN NUMBERING PLAN

Comment Date: December 20, 1991
Reply Date: January 17, 1992

On September 26, 1991, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition requesting that the Commission establish a Notice of Inquiry (NOI) to seek information concerning the administration of the North American Numbering Plan.

The North American Numbering Plan (NANP) is administered by Bell Communications Research. NARUC notes that this involves "the assignment of various numbering codes that are of critical importance to the telecommunications industry in North America." NARUC further states that the pending exhaustion of a number of these codes, including area codes and carrier identification codes, "is causing the communications industry to spend untold millions of dollars to devise and eventually implement the chosen solutions." NARUC lists, in addition to the impact on ratepayers, ten issues that it believes require the interest and attention of regulators. NARUC therefore petitioned the FCC to issue a Notice of Inquiry seeking information and comment on the administration of the NANP.

Interested parties may file comments on this petition with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554 by December 20, 1991 and reply comments by January 17, 1992. Two copies of each filing should also be sent to Mary Green, Industry Analysis Division, Common Carrier Bureau, FCC, Room 538, 1919 M Street, N.W., Washington, D.C. 20554. One copy of each filing should be sent to Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of NARUC's petition can be obtained from Downtown Copy Center at (202) 452-1422 and are available for reference and copying in the public reference room maintained by the Industry Analysis Division in Room 538 of 1919 M Street N.W.

For further information, contact Mary Green, Industry Analysis Division of the Common Carrier Bureau, at (202) 632-0745.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-429

In re Applications of

EUGENE WALTON	File No. BPH-870904MS
HENDERSON BROADCASTING OF MEMPHIS, INC.	File No. BPH-870908MJ
DAVID J. BOTT & CARESE C. BOTT, Joint Tenants	File No. BPH-870908MN
PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870909MS
OMNI BROADCASTING CORPORATION	File No. BPH-870908MV
GERMANTOWN BROADCASTING CORPORATION	File No. BPH-870908MY

For Construction Permit for
New FM Station, Channel 298A,
Germantown, Tennessee

Appearances

Cary S. Tepper, on behalf of Eugene Walton; *Richard H. Waysdorf*, on behalf of Henderson Broadcasting of Memphis, Inc.; *Harry C. Martin, Matthew H. McCormick*, and *Andrew S. Kersting*, on behalf of David J. Bott & Carese C. Bott, Joint Tenants; *Stephen Diaz Gavin*, on behalf of Pederson Communications Limited Partnership; *Harold K. McCombs* and *Robert A. Marmet*, on behalf of Omni Broadcasting Corporation; *James R. Cooke*, on behalf of Germantown Broadcasting Corporation; and *Norman Goldstein*, on behalf of the Mass Media Bureau.

DECISION

Adopted: October 11, 1991; Released: October 29, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Chairman MARINO:

1. Six applicants remain in the comparative contest for a new FM broadcast station in Germantown, Tennessee, following the dismissal of four applicants which did not file exceptions. *See Eugene Walton*, 6 FCC Rcd 4168 (Rev. Bd. 1991). Eugene Walton (Walton) was selected as the superior comparative applicant in the *Initial Decision* of Administrative Law Judge Joseph Gonzalez (ALJ), 6 FCC Rcd 1288, at para. 145 (1991) (I.D.) . The principal questions presented on appeal are: (a) whether Walton demonstrated good cause for amending his application during the course of the hearing to eliminate a "short-spacing" problem; (b) whether the ALJ should have decisionally diminished the comparative "integration" credit for participation of ownership in the management of the proposed station of Henderson Broadcasting of Memphis, Inc. (Henderson), David J. Bott and Carese C. Bott, Joint Tenants (Bott), and Pederson Communications Limited Partnership (Pederson); and (c) of the remaining two applicants, whether Omni Broadcasting Corporation (Omni) or Germantown Broadcasting Corporation (GBC) is the superior comparative applicant. For the reasons set out fully below, we conclude that Walton did not establish good cause for his amendment, that he is thus disqualified for lack of a viable transmitter site, and that Omni is the superior comparative applicant.

BACKGROUND

2. Although each of the six remaining applicants claimed 100% quantitative integration credit, the ALJ only partially credited the proposals of Henderson and Pederson, and totally discounted that of Bott. Specifically, Henderson and Pederson each received 20% credit, because their respective 80% nominally passive owners were not sufficiently insulated from active participation in the management and control of the applicants. Their outside media interests were attributed to their respective applicant under the diversification criterion because of the defective requisite insulation. Bott received no credit because it failed to demonstrate how its principals could effectuate their proposals. As for the three applicants awarded 100% credit, Walton was selected on the basis of his superior qualitative enhancements: 100% minority ownership credit; long-time service area residence/civic involvement; and extensive past broadcast experience. He also was awarded a very slight coverage preference over Omni, which ranked second. Omni was awarded enhancement credit for long-term service area residence, 51% female ownership credit, and 100% extensive past broadcast experience. GBC, in third place, received enhancement credit only for past broadcast experience and a proposal to move to the proposed service area.

3. Before addressing the comparative analysis, we turn to the more immediate question whether the ALJ properly permitted Walton to amend his application to specify a new transmitter site approximately one year after the applications had been designated for hearing. The amendment, which for the first time brought Walton's proposed antenna site into compliance with the Commission's minimum distance separation between stations rule, *see* 47 CFR § 73.207, was filed after a waiver request of that rule had been rejected by the ALJ, and a basic qualifying "short-spacing" issue had been specified against Walton. Acceptance of the amendment permitted the ALJ, by *Order*, FCC 89M-2593, released November 3, 1989, granting a motion for summary decision, to resolve the short-spacing issue in Walton's favor.

TRANSMITTER SITE ISSUE

4. In applications filed September 4, and September 8, 1987, respectively, Walton and one of his opponents, GBC, proposed to mount their transmitting antennae on an existing tower owned by the Baptist Memorial Hospital in Memphis, Tennessee. That tower supported a number of existing or authorized FCC common carrier and private radio communications facilities. Bott subsequently also specified the tower site in an amendment filed November 19, 1987, the deadline for predesignation amendments as of right, pursuant to Section 73.3522(a)(6) of the Commission's Rules, 47 CFR § 73.3522(a)(6). Coordinates for the tower were obtained from the hospital or licenses of the facilities located thereupon. Unbeknownst to the three applicants, however, the Commission's data base (and licenses) contained the wrong geographical coordinates for the tower. The tower was actually 0.51 kilometers short- spaced to station KFTH (FM) in Marion, Arkansas (distance separations under 0.50 kilometers are permissible because 47 CFR § 73.208(c)(8) allows applicants to round off distances to the nearest kilometer). The first recognition of the data base error occurred when GBC filed an amendment specifying a new site on the same day Bott amended to GBC's site. GBC reported that the property owner had given it incorrect coordinates for the tower and that the tower was short-spaced to KFTH. A *Public Notice* announcing receipt of GBC's amendment was released December 9, 1987. Presumably alerted by the *Public Notice*, Bott filed a petition for leave to amend on February 5, 1988 to specify a new site. Bott reported that it had obtained a copy of GBC's amendment disclosing the error, and that, after confirming there was indeed an error, launched an immediate search for an acceptable alternate site. The *Public Notice* announcing the receipt of Bott's amendment was released February 16, 1988.

5. Prior to either amendment, Walton had sought assistance from the Federal Aviation Administration (FAA) concerning the overall height of the tower on learning that several small communications antennae were mounted at the top of the supporting structure extending above the tower's beacon light. He was informed by the FAA that they "had no record of a tower structure at [that] location." Walton Amendment, filed November 10, 1987. Thereupon, he contacted the FCC Antenna Survey Branch, which showed a tower at his specified coordinates, but which also showed differing figures for the overall height on some of the licenses of the tower stations. He then commissioned a site survey to determine the correct elevation (but not the correct coordinates), and filed an amendment on November 10, 1987 to that effect. The *Hearing Designation Order* (HDO), 3 FCC Rcd 5591, released on September 20, 1988, was utterly silent as to Walton's short-spacing deficiency.

6. Following release of the *HDO*, GBC filed a petition on October 28, 1988 to enlarge issues against Walton seeking, *inter alia*, a short-spacing issue. By opposition, filed November 23, 1988, Walton claimed that, until the filing of GBC's petition to enlarge, he had no reason to suspect any problem with the Commission's information. In response to the allegation, however, he commissioned a study, which confirmed that his proposal was short-spaced to KFTH "in the amount of 35 meters." He included in the opposition a "Contingent Waiver Request," advising that the request would be confirmed by future amendment, which would also reflect the correct coordinates for the proposed tower. He further inserted a footnote declaring that "[i]f for any reason the Commission deems that a waiver cannot be granted or that amendment to a new site is necessary, [he] respectfully requests that he be provided with thirty days to amend his application." Opposition, n. 2. The justification proffered in support of the waiver was a mere recitation that "[t]he short-spacing described herein, 10-35 meters, is *de minimis*. " *Id.*, Engineering Statement, p. 4. The petition for leave to amend correcting the coordinates and including the related short-spacing waiver request followed a few days later on November 28, 1988.

7. By *Order*, FCC 89M-2028, released August 4, 1989, the ALJ found good cause for accepting Walton's amendment correcting the coordinates, but denied the waiver request, noting that Walton had not made a public interest showing warranting a waiver. In a companion *Memorandum Opinion and Order*, FCC 89M-2029, released the same day, the ALJ added the short-spacing issue against Walton. Thereupon, Walton promptly filed a petition for leave to amend on September 5, 1989, specifying a new non-short-spaced site. Walton claimed he had been diligent since he commenced preparation of the amendment within a few days of the ALJ's ruling; that the amendment was involuntary since it was necessitated by the specification of the short-spacing issue; and that he could not reasonably have foreseen the ALJ's ruling, noting that even the Bureau had initially supported his waiver request before reversing its position on discovering that he had neglected to accompany his waiver request with a public interest showing required by case precedent. The Bureau's Comments filed September 14, 1989 supported acceptance of the Walton amendment. By *Memorandum Opinion and Order*, FCC 89M-2517, released October 25, 1989, the ALJ accepted the amendment, agreeing with Walton that the specification of the issue could not have been reasonably foreseen. The summary decision in favor of Walton on the issue quickly followed. *Memorandum Opinion and Order*, FCC 89M-2593, *supra*.

8. In their exceptions, Bott, Henderson, and GBC raise an initial argument that Walton could not satisfy the good cause test for postdesignation engineering amendments because he should have known about the coordinates discrepancy as early as the end of 1987, after being informed by the FAA that it had no record of the tower at his proposed location, and after public notices had been released concerning GBC's and Bott's amendments to move away from the proposed site, reporting the short-spacing to the Marion, Arkansas FM facility.

9. The traditional criteria for satisfying the "good cause" test required by Section 73.3522(b) of the Commission's Rules, 47 CFR § 73.3522(b), for postdesignation amendments, are set forth in *Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970):

> [1] the moving party must demonstrate that it acted with due diligence; [2] that the proposed amendment was not required by the voluntary act of the applicant; [3] that no modification or addition of issues or parties would be necessitated; [4] that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; [5] that the other parties will not be unfairly prejudiced; and [6] that the applicant will not gain a competitive advantage.

In addition, Section 73.3522(b) states that, in the case of engineering amendments, the usual good cause showing must also be accompanied by a demonstration:

> (i) That the amendment is necessitated by events which the applicant could not reasonably have foreseen (*e.g.*, notification of a new foreign station or loss of transmitter site by condemnation); and
>
> (ii) That the amendment does not require an enlargement of issues or the addition of new parties to the proceeding.

Here, although it is a very close question, we cannot fault the ALJ's determination that there was no persuasive showing that Walton was, in fact, or should have been, aware that the coordinates were incorrect prior to the October 28, 1988 filing of the petition requesting the short-spacing issue. With respect to the FAA's negative report, which occurred merely because Walton had sought their assistance in ascertaining the overall height of the hospital tower, Walton was nonetheless assured of the existence of the tower location by the FCC Antenna Survey Branch, which showed differing figures for the overall height of some of the licensees' facilities located on the tower, the *focus* of his inquiry. The site survey resolved his immediate problem, and it is conjecture to contend that the FAA's response in the context of a dissimilar inquiry should have also alerted him to the erroneous coordinates. The Commission has previously held that an applicant cannot reasonably have foreseen that its source for geographical coordinates, *i.e.*, the unchallenged coordinates specified in applications of approved Commission licensees, would be incorrect. *See Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1057-1058 (1982). We perceive no reason for departing from the *Brownfield* holding on the facts of this case.

10. And, as for being placed on notice by the GBC and Bott site amendments, Walton states that neither of his opponents was required to serve him with a copy of its amendment, and neither, in fact, served him with a copy. Walton also notes that the public notices released in relation to the receipt of the amendments only briefly reported a change in antenna site, without stating the reasons why the amendments were filed. That Bott however was alerted to a potential problem by the *Public Notice* pertaining to GBC is not surprising. One would expect Bott to have a "heightened sensitivity" to public notices reporting changes in GBC's proposed antenna site because Bott amended to GBC's proposed site on the final date for predesignation amendments as of right. Finally, Walton asserts that, at the time the amendments were filed, the proceeding had not advanced to the designation stage where applicants closely scrutinize every movement of their competitors. Whether or not this is to be recommended as good legal practice, it is significant to our ultimate determination that, unlike Walton, the Commission's processing staff *had* copies of the amendments of GBC and Bott, yet inadvertently overlooked the fact that Walton had proposed the same site coordinates as the amended proposals. Walton cannot be held to a higher standard than the Commission presumes for its own records. *See generally NJT Limited Partnership*, 4 FCC Rcd 7969 (Chief, Audio Services Division 1989) (official notice taken of Commission's data base for resolving discrepancies on erroneous coordinates for existing tower listed by three applicants).

11. More troubling, however, is Walton's failure to specify a non-short-spaced site immediately when alerted to the short-spacing problem by the filing of GBC's petition to enlarge issue. Following oral argument, the Board, by *Order*, 6 FCC Rcd 4236, released July 11, 1991, directed the parties to file comments on the following questions:

> Whether, *as a matter of law*, Walton's November 28, 1988 request to amend to a short-spaced site should have been summarily rejected and no waiver considered; or whether Walton's short-spacing proposal was patently defective *ab initio*, leading to Walton's technical disqualification at that point;
>
> Assuming, *arguendo*, that immediate disqualification based on the tenets of *Donovan Burke* [104 FCC 2d 843 (1986)] (and *North Texas Media* [*Inc. v. FCC*, 778 F.2d 28 (D.C. Cir. 1985)]) was not warranted when Walton concurrently sought a short-spacing waiver, was Walton entitled to seek to amend again; and, could Walton legitimately have claimed to have met the very strict "diligence" and "unforeseeability" components of 47 CFR § 73.3522(b).

Our *Order* stemmed from the fact that normally short-spacing matters are resolved while applications are on the processing line. Under the "hard look" procedures for processing FM broadcast applications, the Commission returns short-spaced applications as unacceptable for filing where the applicant fails to request a waiver of the distance separation rule. *Donovan Burke*, *supra*. Indeed, in the *HDO* in this proceeding, the Commission returned the application of Heart of America Broadcasting, Ltd. as unacceptable for filing because that applicant's proposed facilities were 0.8 kilometers short-spaced to the very same Marion, Arkansas facility, and it filed no waiver request. 3 FCC Rcd at 5591-5592. Resubmission of an application with a curative amendment does not gain the applicant *nunc pro tunc* status, and thus its dismissal is final. *Id.*; *see also Ying Hua Benns*, 3 FCC Rcd 2143 (Chief, Audio Services Division 1988). Moreover, for applications filed on or after April 18, 1986, the release date of *Donovan Burke*, they are returned even where the applicant includes a waiver request, if the request is denied; and the application will not gain acceptance *nunc pro tunc* by filing a curative amendment. *Burke*, 104 FCC at 847; *see also Mid-Coast Radio, Inc.*, 4 FCC Rcd 8719 (Chief, Audio Services Division 1989) (affirmed denial of waiver and return of the application).

12. Commission policy, except for one exception, does not permit waiver of the separation requirements unless the applicant first makes a threshold showing that suitable non-short-spaced sites are unavailable and that the proposed site is the least short-spaced of those suitable short-spaced sites. *Townsend Broadcasting Corp.*, 62 FCC 2d 511, 512 (1976); *Megamedia*, 67 FCC 2d 1527, 1528 (1978); *Mid-Coast Radio, Inc.*, *supra*; *see however Naguabo Broadcasting Co.*, 6 FCC Rcd 4879 (1991) (equating short spacing of 3.01 km and 3.35 km as 3 km after rounding off). The one exception to the requirement of a threshold showing is when the short-spacing is *de minimis*, a distance the Commission has set as no more than one mile. *Kenter Broadcasting Co.*, 62 RR 2d 1573, 1577 n. 9 (1986), *aff'd sub nom. Kenter v. FCC*, 816 F.2d 8 (1987). Even if *de minimis*, however, an applicant must demonstrate that

the public interest will be served despite the minor deviation from the spacing rule. *Id.* A waiver request supported merely by a recitation of the *de minimis* extent of the short-spacing is insufficient justification for a waiver. *A. P. Walter, Jr.*, 4 FCC Rcd 652 (Chief, Audio Services Division 1989).

13. Walton responds in its supplemental brief that he was entitled to seek a waiver because of the *de minimis* nature of the short spacing, his reliance on the FCC records that the site was fully spaced, and payment of the hearing fee. He characterizes the November 1988 amendment as a "reporting amendment," submitted at the Bureau's suggestion to meet his obligation to inform the Commission of the true coordinates of his tower. He also adverts to his pledge in the opposition to the petition to enlarge issues to file a curative amendment in the event the waiver request was denied. He claims that he was entitled to a thirty-day grace period, relying on *Trend Broadcasting, Inc.*, 18 FCC 2d 749 (1969), which accorded an applicant a thirty-day period for a curative amendment following a waiver denial. Walton also cites to *Don H. Barden*, 4 FCC Rcd 4013 (Rev. Bd. 1989), for support that he could amend his application after his waiver was denied. Walton contends that *Donovan Burke* is inapplicable here, that that case is limited to the "hard look" tenderability review guidelines for processing FM applications and not to be applied where an application has already completed FCC processing review, been accepted for filing, designated for hearing, and subject to the statutory hearing fee. Finally, Walton enumerates a number of factors, which, he argues, justifies special treatment. These include the origin of the present difficulty (*i.e.*, error in the FCC data base); his immediate commission of a site survey on learning of the short-spacing allegation; his promptness in responding to the petition to enlarge, advising the Commission of the true coordinates and his willingness to amend to a new site if the waiver request was denied; the vagueness of the law at the time the waiver was requested, as reflected by the Bureau's vacillation; the *de minimis* nature of the short- spacing; no disruption to the hearing; the payment of the hearing fee; and his comparative superiority. The Bureau agrees that Walton was entitled to seek the waiver, but adds that, in light of Walton's legal error in failing to make the requisite *Kenter* public interest showing, his application had to be dismissed. For their part, Walton's opponents contend in varying degree that the waiver request should not have been considered, or if considered, denied; and that neither the November 1988, nor the September 1989, amendment should have been accepted.

14. *Discussion.* At the outset, no exceptions have been filed to the ALJ's denial of the waiver request, and in light of the fact that the remaining applicants specified non-short-spaced sites, and that no public interest showing sufficient to support a waiver request was filed, as required by *Kenter Broadcasting Co.*, 62 RR 2d at 1577 n. 9, *see also A. P. Walter, Jr.*, 4 FCC Rcd at 652 (mere recitation of *de minimis* extent of short-spacing insufficient to justify a short-spacing waiver), we perceive no basis for disturbing that ruling. Under the FM processing guidelines, the Commission would have promptly returned Walton's application as unacceptable for filing, and allowed no subsequent curative amendment, if he had openly filed a short-spaced application with the same waiver justification. *E.g., Donovan Burke, supra.* Walton is correct, however, that *Burke* merely sets forth the Commission's predesignation processing policies for implementing the "hard look doctrine" pertaining to FM applications, and is applicable to the predesignation stage, as was *Trend Broadcasting, supra*, and its practice of retaining an application after waiver denial for a period of thirty days subject to a curative amendment, before that practice was explicitly eliminated by *Burke* for applications, as here, filed on or after April 18, 1986. Walton's reliance on *Old Eureka Broadcasting, Inc.*, 3 FCC Rcd 1682 (Chief, Audio Services Division 1988), alluded to, in passing, in note 10 of its supplemental brief, that *Trend*, and the thirty-day grace period practice, still has vitality, is misplaced. The applicant in question in *Old Eureka* given thirty days to amend, filed its application on March 17, 1986, approximately a month before the *Burke* policy change became effective. In any event, we have previously held in *George Henry Clay*, 5 FCC Rcd 317, 318 (Rev. Bd. 1990), *recon. denied sub nom. Alabama Radio Movement, Inc.*, 5 FCC Rcd 2997 (1990), that the "hard look" processing guidelines are intended to be applied at the "initial" staff review stage, and have also indicated a reluctance to extend the processing policies to applications set for hearing. *See Rio Grande Broadcasting Co.*, FCC 91R-85, released September 26, 1991, at n. 6.

15. Once a hearing has been designated, the "singular standard for [engineering] application amendments . . . remains as set forth in Section 73.3522(b) of the rules," *George Henry Clay*, 5 FCC Rcd at 318; that is, the good cause test enunciated in *Erwin O'Conner, supra*, and the additional unforeseeability requirement prescribed by Section 73.3522(b). Initially, we are unable to find that Walton established the requisite due diligence for its 1989 postdesignation amendment. An applicant's diligence is measured from the time "the applicant is, *or should have been*, apprised of the problem requiring amendment." *Horizon Broadcasting, Inc.*, 103 FCC 2d 656, 659 (Rev. Bd. 1986) (Emphasis in original). The burden is squarely on the applicant seeking to amend to fully demonstrate due diligence. *See Capitol City Broadcasting Co.*, FCC 91R-86, released September 26, 1991, at para. 9. Walton's 1989 amendment came more than ten months after GBC's petition to enlarge alerting Walton to the short-spacing problem. The law was well settled at the time the waiver was requested in November 1988 that such waivers were generally disfavored in the absence of an initial threshold showing that suitable non-short-spaced sites were unavailable, *see generally Townsend Broadcasting, supra* (a 1976 case), or a sufficient showing that *de minimis* short-spacing would serve the public interest, *Kenter*, 62 RR 2d at 1577 n. 9 (a 1986 case). Walton's election in November 1988 merely to correct the tower coordinates and retain his existing site (Bott notes in its exceptions at n. 8 that Walton's originally claimed population coverage was greater than any of the current proposals), based on a facially deficient waiver request, was, needless to say, an extremely risk-laden approach. Having chosen that route, however, Walton could not establish diligence when the waiver was denied. *See Goodlettsville Broadcasting Co., Inc.*, 5 FCC Rcd 4593 (1990)(due diligence lacking where one of seven applicants originally short-spaced chose to remain at the short-spaced site predicated on rule change not yet effective). As in *Goodlettsville*, both GBC and Bott promptly amended to non-short-spaced sites on learning that their originally proposed sites were not in compliance with the Commission's minimum distance separation requirements. Walton's reliance on *Don H. Barden, supra*, that it could file

its September 1989 amendment after denial of the waiver request is misplaced. That case simply allowed an applicant to amend its application where it previously had not been given an opportunity to correct a deficiency overlooked by the processing staff, that if timely discovered, could have been corrected during processing. Here, Walton had his opportunity to specify a non-short-spaced site in November 1988, but failed to do so. The applicant's (or counsel's) election to seek a facially deficient waiver rather than promptly amending to a non-short-spaced site provides no justification for an untimely amendment. *See Sharron Annette Haley*, 6 FCC Rcd 4630 (1991)(relevant Commission precedent afforded applicant notice on how to proceed or suffer the consequences of dismissal).

16. With the denial of the waiver request, Walton could not meet the unforeseeability requirement prescribed by 47 CFR § 73.3522(b). While Walton argues that he could not reasonably have foreseen the ALJ's denial of his defective waiver request, this argument is unavailing in light of settled Commission precedent that such waivers would not be granted when non-short- spaced sites were available absent a very strong public interest showing, a showing utterly lacking here. As noted, *supra*, Walton's opponents promptly specified non-short-spaced sites when they were similarly confronted with a short-spacing deficiency. Nor can Walton's election to await denial of the waiver request be fairly said to be involuntary because that choice was obviously within his control. Had he been permitted to remain at his original site, his coverage proposal would have been superior over those of his opponents. Acceptance of the 1989 amendment would be unfairly prejudicial to those applicants which promptly amended to non-short-spaced sites when learning that their sites were short-spaced, and to those applicants which specified non-short-spaced sites from the outset to their detriment of potentially greater coverage offered by the short-spaced site. *See SBM Communications, Inc.*, FCC 91-288, released September 25, 1991 (waiver of new settlement rules for agreement filed one day late denied because of prejudice to applicants terminating negotiations because they could not be finalized on due date); *cf. Quinto Broadcasting Corp.*, FCC 91-294, released September 27, 1991 (acceptance of late-filed amendment unfairly prejudicial to those complying with the rule).

17. Finally, Walton's "equities" do not dictate a contrary result. To the extent the specification of the short-spaced site resulted from the error in the Commission's data base, Walton was entitled to amend timely to a non-short-spaced site. He failed to do so, and cannot now complain that the Commission's error affords him yet another opportunity to amend. He has no one but himself to blame for his mistake of law in believing that he could amend further if the waiver request were denied, or in failing to advance a public interest showing other than a mere recitation that the short-spacing was *de minimis*. *See Quinto Broadcasting Corp., supra*, at para. 4 (applicants are responsible for compliance with the rules and may not shift responsibility to others). That Walton has paid the hearing fee and prosecuted his application does not accord him extra equities concerning late-filed amendments. *See Achernar Broadcasting Co.*, FCC 91-280, released September 19, 1991, at para. 14 (application will not be granted merely because applicant has invested considerable amounts of time, effort, and money in the prosecution of its application); *see also Pueblo Radio Broadcasting Service*, 4 FCC Rcd 7510, 7511 n. 2 (Rev. Bd. 1989) (question whether a processing error is grounds for remittance of the filing fee is a matter for the Managing Director) (subsequent history omitted). Finally, his alleged comparative superiority is problematical in light that exceptions relative to his comparative posture have not been reached. *See McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7271 (Rev. Bd. 1990) (only qualified applicants entitled to comparative consideration), *rev. denied*, 6 FCC Rcd 2347 (1991). In sum, we find that Walton was entitled to correct the coordinates of his originally proposed site and ask for a waiver of the rules, but after his waiver was denied, the application was subject to dismissal on a motion for summary decision for lack of a non-short-spaced site. The application must be denied here for lack of a viable site because he has not shown good cause for acceptance of his 1989 amendment. *Cf. Evergreen Broadcasting Co.*, FCC 91-267, released September 20, 1991, at para. 33.

QUANTITATIVE COMPARATIVE FACTORS

18. In its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC Rcd 393 (1965), the Commission declared that "integration," participation of ownership in the management of the proposed station, was a factor of substantial importance. "It is inherently desirable that legal responsibility and |full time integration in| day-to-day performance be closely associated." 1 FCC 2d at 395. Subsequent cases have established that where a sufficient quantitative integration ownership difference exists between applicants, the Commission looks only to the quantitative difference in selecting the superior comparative applicant. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989) (subsequent history omitted). A difference of 12.5% in ownership integration (1250 using the appropriate Commission index) is deemed a decisional quantitative difference. *See id.*

19. Broadcast applicants can maximize their comparative credit for integration of ownership into management and minimize their disadvantage resulting from ownership and control of other broadcast stations by utilizing corporations with voting and non-voting stock, and limited partnerships. However, the limited partners and non-voting stockholders must be fully insulated, as required by Commission policy, and they must be completely passive and not active or in control of the applicant. *See generally Evergreen Broadcasting Co., supra*, and cases at paras. 14-16 therein.

20. "[W]here a passive owner is shown to be involved in the applicant's activities after that applicant has been held out as a passive investor, that owner's interest will be considered for comparative purposes." *Coast TV*, 5 FCC Rcd 2751, 2752 (1990). Evidence of such post-organizational activity is deemed "better" in deciding whether the nominally controlling owners will actually exercise exclusive control. *See Evergreen*, at para. 16. But, if any doubt is raised about the *bona fides* of the proposal, then the Commission has mandated that we must consider "the entire record, that is the totality of the facts concerning the principals' pre- and post-formation activities, as well as the circumstances surrounding the applicant's formation." *Evergreen*, at para. 12.

HENDERSON BROADCASTING OF MEMPHIS, INC.

21. Freddie Henderson owns all of the corporation's voting stock (20%); and H.A. Gilliam, Jr. owns all of the non-voting stock (80%). I.D., para. 23. Henderson's integration credit was reduced to 20% by the ALJ, because "Mr. Gilliam has not been and will not be insulated from active participation." *Id.*, at para. 31. After reviewing the record, *id.*, paras. 33-35, the ALJ found that the testimonies of Gilliam, the alleged passive owner, and Henderson, the active owner, were "not believable." *Id.*, at para. 36. In summing up the evidence, the ALJ observed that (*id.*):

> It is simply not credible that someone of Mr. Gilliam's background in broadcasting, strong interest in the project as well as his significant financial commitment to the process and equity interest in the applicant would remain purely passive during the application process or once the proposed station is operational, remain on the side lines; to date the evidence of record indicates that he hasn't, since virtually all significant decisions were made by him at the very beginning of the process with Mr. Henderson following the path already paved by Mr. Gilliam. The evidence of record, therefore, viewed as a whole, warrants the conclusion that Mr. Gilliam is, and has not been a purely passive investor, and that his equity interest of 80 percent must be considered in determining the amount of quantitative integration credit due Henderson for its proposal to integrate Mr. Henderson into the management of the proposed station.

22. Henderson, Br. at 3-23, challenges the ALJ's refusal to award 100% credit, and insists here, as Freddie Henderson did in his direct written testimony exchanged prior to hearing (Henderson Exh. 4, pp. 10-12), that Henderson was the *prime mover* behind this application and that he later asked Gilliam (Henderson's long-time employer who owned a radio station at nearby Memphis, Tennessee) to join the venture as a passive investor. In fact, the record evidence summarized in the ALJ's findings paints a different picture from Henderson's written tale.

23. Gilliam had intended to apply for the station using Gilliam Communications Inc. On advice of counsel (and because of his other broadcast interests), Gilliam encouraged Henderson to apply (Gilliam indicated to Henderson that he would finance the project). Gilliam furnished Henderson with a preliminary engineering study, which he had commissioned. Gilliam supplied Henderson with information about potential transmitter sites. And Gilliam suggested that Henderson contact his communications counsel, who recommended that Henderson retain a different counsel. Henderson did retain the engineer who had prepared the study for Gilliam. Gilliam arranged for Henderson to meet with a banker to obtain a loan letter, and Gilliam agreed to personally guarantee the loan. I.D., para. 32. In the application filed September 8, 1987, Henderson had held himself out as the active owner of 20% of the voting stock, and Gilliam as the passive owner of 80% non-voting stock. The applicant also certified that: "Gilliam will not be involved in any material respect in the management of the proposed station." Henderson Application, Exh. 4, Section II, para. 8.

24. At the time, Henderson's corporation had only one class of stock. Henderson retained a local law firm, which had previously represented Gilliam, to prepare the appropriate corporate documents. Both Gilliam and Henderson deny that Gilliam recommended the local firm. I.D., para. 32. Henderson had not told Gilliam that, as Gilliam was to be passive owner, they could not discuss the application, Tr. 3151, and Gilliam believed they could discuss questions regarding the station's format. Tr. 3168; I.D., para. 34. Gilliam and Henderson deny that Gilliam was present at a corporate organizational meeting held on November 17, 1987 in the office of local counsel, several months after their application had been filed, but the corporate minutes indicate that Gilliam was present at local counsel's office for a first and second meeting. As the ALJ observed, no explanation was given why the minutes were prepared ahead of time, or why they were not corrected later. *Id.*, para. 33. Regarding the applicant's financial arrangements, Gilliam testified that he had seen some of the bills sent to Henderson. Tr. 3164. The ALJ found (*id.*, at para. 35):

> Although Mr. Gilliam's financial stake in this project is considerable, both he and Mr. Henderson deny any involvement by Mr. Gilliam in financial matters affecting the station. Mr. Henderson mentioned, however, that he discusses finances with Mr. Gilliam all the time, but later clarified that remark by stating that he only tells Mr. Gilliam about expenses once a month (Tr. 477). He indicated that he does not provide invoices to Mr. Gilliam, does not seek his permission or approval to pay bills, and does not provide Mr. Gilliam with any detailed accounting (Tr. 505, 3067, 3086, 3145-46). According to Mr. Henderson, his calls to Mr. Gilliam are simply requests for his pro-rata share of the expenses (Tr. 480-81, 484, 677, 3067, 3131, 3145).

25. It was at this point in his I.D., at para. 36, that the ALJ found and concluded that their testimony was not believable and their story not credible. We share the ALJ's general skepticism even from a review of the cold record. And under the Commission precedent discussed in *Evergreen, supra*, we first hold that the ALJ's findings about the post-organizational activities, standing alone, justify his award of only 20%. Obviously, that evidence does not stand alone and when the totality of the evidence detailed in the I.D. is considered, it fully justifies the ALJ's action.

PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP

26. Paula M. Pederson is the general partner of this limited partnership with 20% interest, and B. Scott Reardon III is a limited partner, with an 80% interest. I.D., para. 77. Pederson has no broadcast experience; Reardon had a substantial interest in an FM station at the time this application was filed. *Id.*, paras. 81, 83. Here, as in the Henderson application, the ALJ concluded that: "There is some evidence in the record that the Pederson principals have made a conscious effort to make it appear that Ms. Pederson's contribution was more significant than it was." *Id.*, at para. 92. In essence, "Pederson is entitled, at very most, to only a 20% full-time integration

credit . . . ." *Id.*, at paras. 92-93. Summing up his findings, *id.*, paras. 86-90, the ALJ observed that (*id.*, at para. 91):

> Mr. Reardon was the driving force behind the Pederson application. He, in effect, selected the general partner and communications counsel who, in turn, selected Pederson's broadcast consultant and its engineering firm. Ms. Pederson was not sought out because of her broadcast experience, of which she has none, or Mr. Reardon's personal knowledge of her qualifications since she was unknown to him; he approached her because she is a resident of Germantown, Tennessee and a female; factors which, he certainly knew, when attributed to a 100 percent full-time integration pledge would place Pederson at a very high comparative standing vis-a-vis the other applicants in this proceeding. Mr. Reardon also supplied the draft limited partnership agreement, secured the necessary financing and has assumed the major responsibility for the costs of prosecuting the application. These factors, when considered along with the non-insulating partnership agreement, make it quite clear that Mr. Reardon was not and is not the passive insulated investor, which would entitle Ms. Pederson to be considered the sole principal in control of the entity.

27. Briefly summarized, the record establishes that:

(a) Reardon arrived in Germantown ten days before the application was due to find a general partner. Tr. 1977; I.D., para. 86.

(b) Reardon did not know Pederson before recruiting her, after one meeting, to be his general partner. *Id.*

(c) Pederson had no broadcast experience. *Id.*

(d) Reardon or his lawyer sent Pederson the draft partnership agreement. *Id.*

(e) The agreement did not prohibit the limited partners from talking to the general partner about day-to-day operation of the business. I.D., para. 88.

(f) The agreement provided that the limited partners, and not a court of competent jurisdiction, could determine the general partner's incompetence. *Id.*, para. 88.

(g) Finally, on December 13, 1988, Pederson proposed to amend the agreement to include the required insulation provisions. *Id.*, para. 89.

28. Given this record, Pederson's case is controlled by *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991), where the Commission indicated that when an individual like Reardon, who was the driving force behind the application, purports to be "giving away control or ownership in a manner that is patently unreasonable on its face . . . it is unrealistic to conclude that an applicant's proposed grant of exclusive and integrated control to nominally active principals is reliable." 6 FCC Rcd at 2498; *See also Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), *modified*, 5 FCC Rcd 5610 (1990). Moreover, Reardon's give away was illusory and fatally flawed, because the limited partnership agreement did not contain two of the insulation provisions required by the Commission. I.D., paras. 88-89. *See also Evergreen*, at para. 8 (citing *Cotton Broadcasting*, 4 FCC Rcd 1781, 1784). The belated attempt to amend the agreement was correctly held by the ALJ to be violative of the principle against comparative upgrading. I.D., para. 90. *See Charisma Broadcasting Corp.* 6 FCC Rcd 3411 (Rev. Bd. 1991); *Doylan Forney*, 3 FCC Rcd 6330, 6332 (Rev. Bd. 1988), *rev. denied*, 5 FCC Rcd 5423 (1990).

29. Since the cited precedent establishes that the two independent grounds are sufficient to justify the ALJ's award of only 20% credit, we do not reach the additional findings that "Ms. Pederson has not met her burden of establishing the permanence of her integration commitment,and on that basis alone, Pederson is not entitled to any integration credit . . . . *See Doylan Forney*, 3 FCC Rcd at 6333, 6334 (Rev. Bd. 1988)." I.D., at para. 93.

DAVID J. BOTT & CARESE C. BOTT, JOINT TENANTS

30. David J. and Carese Bott are joint tenants, and husband and wife. I.D., paras. 54-55. Finding that the Botts also have a commitment to another proposed station at Mt. Joliet, Tennessee (*id.*, paras. 65-66), the ALJ concluded that: "it is impossible, on the basis of the present record, to reconcile these two commitments and to reach a decision as to the number of hours that either individual can realistically commit to the Germantown facility." *Id.*, at para. 66. Thus, the Botts received no comparative credit.

31. The Botts now argue, Br. at 7, that the Mt. Joliet "conflict" is "secondary to their commitment to integrate full time into the Germantown facility," and that the ALJ "does not reference any case supporting denial of integration credit on the facts cited." Br. at 8. As we recently noted, it is well settled that "if, at the time an integration credit pledge is made to the Commission, an extrinsic contingency could vitiate that pledge, credit will not be awarded." *Charisma Broadcasting Corp.*, 6 FCC Rcd at 3413. And the Commission itself has stressed: "Applicants have the burden of proof to establish how they will effectuate their proposal." *Cuban American Limited*, 5 FCC Rcd 3781, 3785 (1990). Since at least 1982, this Board has indicated that an applicant with other business interests which might conflict with full-time operation of the proposed station must set forth in some detail its integration proposal and specifically allocate time so as to accomodate the other interests and still effectuate its proposal. *Pentecostal Revival Association, Inc.*, 1 FCC Rcd 842 (Rev. Bd. 1986), citing *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 596 (Rev. Bd. 1982).

32. Here, the ALJ made the following findings which have not been substantially been challenged on appeal:

> [I]n addition to their projected duties at the Germantown, Tennessee facility, the Botts have also committed themselves to supervise, both on site and over the telephone, the construction and operation of a station at Mt. Juliet, Tennessee, if their application for that facility is granted. According to Mrs. Bott, her father, Dr. Hugh A. Clarke, agreed to loan the money for the Mt. Juliet station with the understanding that both she and her husband would also be involved in the management of that station. Mr.

> Bott made it clear during the course of his testimony that both he and his wife intend to continue to prosecute the Mt. Juliet application, and that it was certainly not his intention to file superfluous applications (Tr. 1667-68, 1790-91). However, he was uncertain as to whether or not they would keep both the Mt. Juliet and the Germantown stations if both channels were awarded to them (Tr. 1790-1). If denied the Germantown application, however, he indicated that he might manage the Mt. Juliet, Tennessee station although they do not propose to be integrated into the management of that station at this time (Tr. 1791).

I.D. at para. 65. On appeal, the Botts have attempted to resolve the recognized "conflict" created by their Mt. Juliet commitments by declaring it to be "secondary" or in "secondary status" to their Germantown proposal. Br. at 6-7. This approach does not satisfy the heavy burden imposed by the controlling precedent cited above. We, therefore, affirm the ALJ's decision to award no integration credit and his holding that:

> The Botts failed to explain how they could meet their full-time commitments to the Germantown facility and still honor their commitment to Mrs. Bott[']s[] father to be actively involved in the Mt. Juliet facility. In order to award either Bott a quantitative integration credit of any degree in this proceeding, the Presiding Judge would have to ignore their joint commitment to the Mt. Juliet, Tennessee station and to guess as to the extent to which those commitments would impair or render unrealistic their full-time integration commitments to the Germantown, Tennessee facility. The fact that they intend to hire a manager and staff to operate the Mt. Juliet station does not discount their promise to be personally involved in the affairs of that facility (Tr. 1791-92).

I.D., at para. 66.

QUALITATIVE ENHANCEMENTS

33. Since Henderson, Pederson, and the Botts have received significantly less than 100% quantitative credit, they are comparatively inferior by more than the Commission's 12.5% decisional difference. *See* para. 18, *supra*. Two remaining applicants, Omni and GBC, were awarded 100% integration credit and must be compared on the following qualitative factors: local residence, female ownership, and past broadcast experience. Female ownership has less significance than local residence. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). Past broadcast experience is deemed of minor significance. *Policy Statement*, 1 FCC 2d at 396, and accorded less weight than female ownership credit. *Swan Broadcasting Limited*, 6 FCC Rcd 17, 21 (Rev. Bd. 1991).

34. Omni's stock is held by Sally Wilbourn (51%), a non-minority female, and Sam Phillips (49%). I.D., paras. 113, 114. Wilbourn and Phillips have resided in the service area of the proposed station since 1968 and 1957, respectively. *Id.*, paras. 114, 117. Both have operated two broadcast stations in Germantown, the proposed community of license, since 1973. *Id.*, paras. 116, 118. Only GBC has filed limited exceptions. Br. 12-13, arguing that because Phillips has never worked full time on a day-to-day basis at any of his other stations it is simply not credible that he will now, on a permanent basis, work full time at the proposed station. Omni replies, at pp. 2-3, that the record establishes that in the past Phillips was the multiple owner of some five radio stations, and a phonograph manufacturing business. Some of his activities have been transferred to his sons; he has disposed of two Germantown radio stations, Tr. 2640, 2667-68, 2685-87, and pledged to divest himself of his other broadcast interests. Based on this record, and that reflected in the I.D. at paras. 111, 117-119, Phillips has explained how he would effectuate his proposal, and the ALJ was justified in crediting this proposal. *See also National Communications Industry*, 6 FCC Rcd 1978, 1981 paras. 22-23 (Rev. Bd. 1991).

35. Omni was awarded enhancement credit for long term service area residence (100%); past broadcast experience (100%); and female ownership (51%). *Id.*, para. 124. GBC's principals have not resided within the proposed service area, but they do propose to relocate to that area if their application is granted. *Id.*, paras. 134, 136. The past broadcast experience of GBC's principals began in the 1950s. *Id.*, paras. 132, 135. In comparing these two proposals, Omni's past broadcast experience in the community license is balanced by GBC's slightly longer past broadcast experience. Omni's credit for long-term local residence in the service area substantially outweighs GBC's proposal to relocate. *see Policy Statement*, 1 FCC 2d at 396, even before Omni's 51% female ownership is added to the comparison. Omni, therefore, has the superior integration proposal. GBC was also accorded a very slight coverage preference over Omni, but the Commission has previously held that such small preferences for covering already well-served areas are not as important as the preferences accorded to applicants such as Omni here for the qualitative aspects of their integration proposals. *Naguabo Broadcasting Co.*, 6 FCC Rcd at 4881 n. 10. Omni, therefore, is the superior comparative applicant.

36. ACCORDINGLY, IT IS ORDERED, That the application of Omni Broadcasting Corporation (File No. BPH-870908MV) to construct and operate an FM station on Channel 298A in Germantown, Tennessee, IS GRANTED; and,

37. IT IS FURTHER ORDERED, That the applications of Eugene Walton (File No. BPH-870904MS), Henderson Broadcasting of Memphis, Inc. (File No. BPH-870908MJ), David J. Bott & Carese C. Bott, Joint Tenants (File No. BPH-870908MN), Pederson Communications Limited Partnership (File No. BPH-870908MS), and Germantown Broadcasting Corporation (File No. BPH-870908MY), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-401

In re Applications of

OLIVER KELLEY AND MARY ANN KELLEY, Joint Tenants with the Right of Survivorship — File No. BPH-870821MB

VAL-JO COMMUNICATIONS, INC. — File No. BPH-870827MD

MARTHA JEAN SULLIVAN — File No. BPH-870827MM

CAPRICORN BROADCASTING COMPANY, INC. — File No. BPH-870827NK

For Construction Permit for New FM Station, Channel 297A (107.3 MHz), Nolanville, Texas

ORDER

Adopted: October 23, 1991; Released: October 29, 1991

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

1. On August 12, 1991, Capricorn Broadcasting Company, Inc. filed a Motion for Voluntary Dismissal of its application. The Review Board hereby grants its request.

2. As required by 47 CFR §73.3525(c), Capricorn has submitted a declaration indicating that no consideration has been given or received to induce the dismissal of its application, and that the application was not filed for purposes of reaching a settlement agreement. As required by 47 CFR §73.3525(d), all of the remaining parties have filed similar declarations of no consideration.

3. ACCORDINGLY, IT IS ORDERED, That the application of Capricorn Broadcasting Company, Inc. (File No. BPH-870827NK) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v. File No. E-90-267

PACIFIC BELL,
Defendant.

ORDER

Adopted: October 23, 1991; Released: October 29, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Teledial America, Inc. (hereinafter "Teledial") filed the above-captioned formal complaint against Pacific Bell seeking recovery of damages for Pacific Bell's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Pacific Bell filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On October 7, 1991, the parties filed a joint motion seeking dismissal of the complaint. We are satisfied that dismissal of the the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

In-Flight Phone L.P.,
Complainant,

v. File No. E-90-411

GTE Airfone Incorporated,
Defendant.

ORDER

Adopted: October 21, 1991; Released: October 29, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1990, In-Flight Phone L.P. filed the above-captioned formal complaint against GTE Airfone Incorporated (hereinafter "GTE") alleging that GTE violated its experimental radio license for air-to-ground service by offering a Business Calling Card Program to airline passengers. On October 2, 1991, however, In-Flight Phone Corp. (the successor in interest to In-Flight Phone, L.P.) (hereinafter "In-Flight") filed a motion to voluntarily dismiss the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that In-Flight's Motion IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-192

In the Matter of

Amendment of Section 73.202(b), RM-7679
Table of Allotments,
FM Broadcast Stations.
(Royal City, Washington)

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 16, 1991; Released: October 29, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Jon Bruce Thoen ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4220 (1991), proposing the allotment of Channel 242C3 at Royal City, Washington, as the community's first local FM transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 242C3 to Royal City, Washington, since it would provide the community with its first local FM transmission service. Channel 242C3 can be allotted to Royal City in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Canadian concurrence has been obtained, since Royal City is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Royal City, Washington	242C3

4. The window period for filing applications will open on **December 16, 1991,** and close on **January 15, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 242C3 at Royal City are North Latitude 46-54-04 and West Longitude 119-37-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-339

In the Matter of

Amendment of Section 73.202(b), RM-7315
Table of Allotments,
FM Broadcast Stations.
(Coahoma, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 16, 1991; Released: October 29, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Joseph Smitherman ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 4683 (1990), proposing the allotment of Channel 232A to Coahoma, Texas, as that community's first local FM service. Petitioner filed comments restating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 232A to Coahoma, since it could provide the community with its first local FM service. Channel 232A can be allotted to Coahoma in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Mexican concurrence has been received because Coahoma is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Coahoma, Texas	232A

4. The window period for filing applications will open on **December 16, 1991,** and close on **January 15, 1992.**[2]

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 232A at Coahoma are North Latitude 32-17-36 and West Longitude 101-18-18.

[2] Applicants should be advised that a counterproposal filed in MM Docket No. 90-614 proposes the substitution of Channel 288A for Channel 232A at Coahoma, Texas. *See* Counterproposal of David W. Wrinkle (RM-7687) filed in response to *Notice of Proposed Rule Making (Big Spring, Texas)*, 5 FCC Rcd 7568 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-121

In the Matter of

Amendment of Section 73.202(b),	RM-7196
Table of Allotments,	RM-7398
FM Broadcast Stations.	
(West Liberty and Richwood, Ohio)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 16, 1991; Released: October 29, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of RAY Broadcasting Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1583 (1990), proposing the allotment of Channel 282A to West Liberty, Ohio, as the community's first local aural service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. Steven Heck ("Heck") filed comments and a counterproposal requesting the allotment of Channel 282A to Richwood, Ohio, as its first local aural service.[2] No other comments were received.

2. Heck states that Richwood (population 2,181)[3] is the largest community in Union County (population 29,536). He claims that Richwood has a civic center, public library, post office, churches, senior citizen housing, weekly newspaper, banks and a public park. However, the only aural broadcast service within the county is provided by Station WUCO(AM) at Marysville, Ohio, which is approximately fourteen miles from Richwood. Heck does not question West Liberty's status as a community but argues that it is less deserving of the allotment because of its smaller population of 1,653 persons. He states his intention to apply for Channel 282A, if allotted to Richwood.

3. We believe that both communities are deserving of their first local aural service. However, neither the proponents nor the Commission's staff has been able to identify an alternate channel for allotment to either community. Therefore, our decision is guided by the guidelines set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3)].

Neither petitioner nor Heck has claimed that the allotment of Channel 282A at either community would provide any first or second full-time aural service but the allotment could provide each with its first local aural service. Therefore, in determining which community should receive the allotment, we have looked at other factors such as the availability of reception services and relative populations. Although Richwood is located closer to the larger community of Marion, Ohio (23.1 kilometers [14.4 miles] southwest vs. 65.1 kilometers [40.5 miles] southwest), neither community is underserved as to reception services, with Richwood receiving six aural services and West Liberty receiving five services.[4] Therefore, we believe the public interest would be served by allotting Channel 282A to Richwood because it could provide a first local transmission service to a larger population (2,181 vs. 1,653). *See Three Oaks and Bridgman, Michigan*, 5 FCC Rcd 1004 (1990).

4. Channel 282A can be allotted to Richwood in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[5] Canadian concurrence in the allotment has been received since Richwood is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Richwood, Ohio	282A

6. The window period for filing applications for Channel 282A at Richwood, Ohio, will open on **December 16, 1991,** and close on **January 15, 1992.**

7. IT IS FURTHER ORDERED, That the request of RAY Broadcasting Corporation (RM-7196) to allot Channel 282A to West Liberty, Ohio, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

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[1] The community of Richwood has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on June 18, 1990, Report No. 1817.

[3] All population figures are taken from the 1980 U.S. Census.

[4] Richwood and West Liberty both receive AM service from Stations WBLL, Bellefontaine, Ohio, WMRN, Marion, Ohio, and WUCO, Marysville, Ohio. Richwood receives FM service from Stations WDIF and WMRN(FM), Marion, Ohio, and WCEZ, Delaware, Ohio. West Liberty receives FM service from Stations WPKO, Bellefontaine, Ohio, and WKSW, Urbana, Ohio.

[5] The coordinates for Channel 282A at Richwood are North Latitude 40-25-36 and West Longitude 83-18-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-312

In the Matter of

Amendment of Section 73.202(b), RM-7583
Table of Allotments,
FM Broadcast Stations.
(Midland and Big Spring,
Texas)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: October 17, 1991; Released: October 29, 1991

Comment Date: December 20, 1991
Reply Comment Date: January 6, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Three Card Enterprises ("petitioner"), permittee of Channel 236A at Midland, Texas, requesting the substitution of Channel 236C3 for Channel 236A at Midland and modification of its construction permit to specify operation on the higher powered channel. To accommodate the substitution of Channel 236C3 at Midland, petitioner also requests the substitution of Channel 239A for Channel 237A at Big Spring, Texas, and the modification of Station KBST-FM's license accordingly. Petitioner states that it will apply for Channel 236C3 and also will reimburse the licensee of Station KBST-FM for reasonable costs associated with the change in channel at Big Spring.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 236C3 for Channel 236A at Midland, Texas, and the substitution of Channel 239A for Channel 237A at Big Spring, Texas, since the proposal could provide Midland with an additional wide coverage area FM service. Channel 236C3 can be allotted to Midland in compliance with the Commission's minimum distance requirements with a site restriction of 8.4 kilometers (5.2 miles) west to accommodate petitioner's desired site. Channel 239A can be allotted to Big Spring in compliance with the Commission's minimum distance separation requirements and can be used at Station KBST-FM's licensed site.[2] Therefore, we will direct an *Order to Show Cause* to the licensee of Station KBST-FM why its license should not be modified to specify operation on Channel 239A in lieu of Channel 237A. In addition, concurrence of the Mexican government has been solicited for these allotments since Midland and Big Spring are located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. As requested, we also propose to modify the construction permit for Channel 236A at Midland to specify operation on Channel 236C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 236C3 at Midland or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Midland, Texas	222C, 227C1, 236A, 277C1, 294C1	222C, 227C1, 236C3, 277C1, 294C1
Big Spring, Texas	237A	239A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, David W. Wrinkle, licensee of Station KBST-FM, Big Spring, Texas, SHALL SHOW CAUSE why his license SHOULD NOT BE MODIFIED to specify operation on Channel 239A as proposed herein instead of the present Channel 237A.

6. Pursuant to Section 1.87 of the Commission's Rules, David W. Wrinkle may, not later than **December 20, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on David W. Wrinkle to furnish additional information. If David W. Wrinkle raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, David W. Wrinkle will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to David W. Wrinkle, P.O. Box 1632, Big Spring, Texas, 79721 (licensee of Station KBST-FM).

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[1] The licensee of Station KBST-FM, Channel 237A, Big Spring, Texas, has filed a counterproposal in MM Docket No. 90-614 requesting the substitution of Channel 240C3 for Channel 237A at Big Spring. *See* Counterproposal of David W. Wrinkle (RM-7687) filed in response to *Notice of Proposed Rule Making*, 5 FCC Rcd 7568 (1990). Should that counterproposal be adopted, no reimbursement will be required by petitioner.

[2] The coordinates for Channel 236C3 at Midland, Texas, are North Latitude 3200-00 and West Longitude 102-10-00. The coordinates for Channel 239A at Big Spring, Texas, are North Latitude 32-13-20 and West Longitude 101-27-35.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **December 20, 1991,** and reply comments on or before **January 6, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Patricia A. Mahoney Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-94

In the Matter of

Amendment of Section 73.202(b), RM-7662
Table of Allotments,
FM Broadcast Stations.
(La Crescent, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 18, 1991; Released: October 29, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 1908 (1991), proposing the substitution of Channel 274C3 for Channel 274A at La Crescent, Minnesota, and modification of the license for Station KQEG to specify operation on Channel 274C3. The *Notice* was issued in response to a petition filed by White Eagle Broadcasting, Inc. ("petitioner"). Petitioner filed comments and reply comments reiterating its interest in Channel 274C3 at La Crescent. WRJC, Incorporated ("WRJC"), licensee of Station WRJC-FM, Mauston, Wisconsin, filed comments.

2. WRJC states that it is involved in a rule making proceeding to substitute Channel 275A for Channel 221A at Mauston.[1] It expresses concern over a conflict that currently exists between the proposed allotment of Channel 274C3 at La Crescent, Minnesota, and the proposed allotment of Channel 275A at Mauston, Wisconsin. According to WRJC, an alternate site is available for Channel 274C3 at La Crescent that removes the short spacing to Channel 275A, allowing both communities to receive expanded service.

3. In reply comments, petitioner acknowledges the short spacing between Channel 274C3 at La Crescent and Channel 275A at Mauston. Petitioner states that a new site has been located by its engineering consultant which meets the requirements set forth in Section 73.207 of the Rules and removes the short spacing to Mauston. Petitioner requests that the new site be used for the allotment of Channel 274C3 at La Crescent.

4. We believe the public interest would be served by substituting Channel 274C3 for Channel 274A at La Crescent, Minnesota, in order to provide the community with a wide coverage area station. Channel 274C3 can be allotted to La Crescent, Minnesota, at petitioner's specified site, in compliance with the Commission's spacing requirements.[2] We will authorize a modification of petitioner's license for Station KQEG, La Crescent, Minnesota, to specify operation on Channel 274C3 in accordance with Section 1.420(g) of the Commission's Rules.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
La Crescent, Minnesota	274C3

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KQEG, Channel 274A, La Crescent, Minnesota, IS MODIFIED to specify operation on Channel 274C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, White Eagle Broadcasting, Inc., licensee of Station KQEG, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

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[1] *See* 6 FCC Rcd 2068 (1991). First Choice Communications, Inc., licensee of Station WMAD-FM, Channel 221A, Sun Prairie, Wisconsin, has requested the substitution of Channel 221B1 for Channel 221A. First Choice Communications also requested the substitution of Channel 275A for Channel 221A, Mauston, Wisconsin, and the substitution of Channel 295A for Channel 221A, Freeport, Illinois, to accommodate the Sun Prairie upgrade.

[2] The coordinates for Channel 274C3 at La Crescent are 43-45-15 and 91-18-10.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-225

In the Matter of

Amendment of Section 73.202(b), RM-7759
Table of Allotments,
FM Broadcast Stations.
(Crosby, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 18, 1991; Released: October 29, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 4734 (1991), issued in response to a petition filed by First Radio Station of Crosby, Inc. ("petitioner"), proposing the substitution of Channel 268C3 for Channel 269A at Crosby, Minnesota. Petitioner also requested modification of its construction permit for Station KTCF-FM, Channel 269A, to specify operation on Channel 269C3. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 268C3 for Channel 269A at Crosby, since it would provide a wide coverage area station to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] Since Crosby is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of the construction permit for Station KTCF-FM, Channel 269A, Crosby, Minnesota, to specify opeation on Channel 268C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 13, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Crosby, Minnesota	268C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KTCF-FM, Channel 269A, Crosby, Minnesota, IS MODIFIED to specify operation on Channel 268C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, First Radio Station of Crosby, Inc., permittee of Station KTCF-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Rugger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 268C3 at Crosby are 46-33-09 and 93-57-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-291

In re Applications of

NORTH CAROLINA CENTRAL UNIVERSITY (hereafter "NCCU") File No. BPED-890313MY

CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC. (hereafter "Central Florida") File No. BPED-900717MC

For Construction Permit for a New Noncommercial FM Station on Channel 214C2 in Durham, North Carolina

HEARING DESIGNATION ORDER

Adopted: September 30, 1991; Released: October 29, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Preliminary Matter.* On December 26, 1990, NCCU's application was dismissed as unacceptable for filing because its radiation pattern was in violation of 47 C.F.R. § 73.316(b)(2) of the Commission's rules. Specifically, NCCU's radiation pattern varied more than 2 dB per 10 of azimuth between 90°T and 100°T, 100°T and 110°T, and 110°T and 120°T. In addition, pursuant to the *Public Notice* entitled "Commission Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications," 56 RR 2d 776, 49 Fed. Reg. 47331, released August 2, 1984, NCCU was afforded an opportunity to resubmit its dismissed application within 30 days of the date of its return with a minor corrective amendment and have its application reinstated *nunc pro tunc* upon request.

3. On January 24, 1991, NCCU petitioned for reconsideration of the Commission's action and reinstatement *nunc pro tunc*. NCCU has submitted a minor corrective amendment which we find acceptable. Accordingly, NCCU's petition for reconsideration and reinstatement *nunc pro tunc* will be granted.

4. *Other matters.* NCCU proposes to locate its transmitting antenna on a new tower and Central Florida proposes an existing tower. Our engineering study indicates that both applicants have failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that NCCU may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposal would have a significant environmental effect under the criteria set out in 47 C.F.R. §1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since NCCU and Central Florida failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, NCCU and Central Florida will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

5. Neither applicant has indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing from participating in negotiations with a view toward establishing a share-time agreement among themselves.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to NCCU and Central Florida in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petition for reconsideration filed by NCCU IS GRANTED.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, NCCU and Central Florida shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 31, 1991

FCC ANNOUNCES 1992 MAXIMUM REIMBURSEMENT FEE FOR AN AMATEUR OPERATOR LICENSE EXAMINATION

The FCC announced today that effective January 1, 1992, the maximum allowable reimbursement fee for an amateur operator license examination will be $5.44. This amount is based upon a 3.4% increase in the Department of Labor Consumer Price Index between September 1990 and September 1991.

Volunteer examiners (VEs) and volunteer-examiner coordinators (VECs) may charge examinees for out-of-pocket expenses incurred in preparing, processing, administering, or coordinating examinations for Technician, General, Advanced, and Amateur Extra Class operator licenses. The amount of any such reimbursement fee from any examinee for any one examination session, regardless of the number of elements administered, must not exceed the maximum allowable fee. Where the VEs and the VEC both desire reimbursement, they jointly decide upon a fair distribution of the fee.

No fee is allowed to be charged for the Novice Class operator license examination.

This announcement is made pursuant to Section 97.527 of the Commission's Rules, 47 C.F.R. § 97.527.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company
Petitions for Waiver of Part 69 of
the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1991; Released: October 4, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 11, 1990, Southwestern Bell Telephone Company (Southwestern Bell) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish a new Switched Access rate element for its common channel signalling (CCS) interconnection service. On June 14, 1990, Southwestern Bell filed a petition for waiver of Part 69 to establish two new Switched Access rate elements for access to the data in Southwestern Bell's line identification database (LIDB). Sixteen comments and seven replies were filed in response to the two waiver petitions.

2. In this Order, we grant Southwestern Bell's waiver to establish new rate elements for provision of LIDB service. We grant Southwestern Bell's CCS interconnection waiver in part, to the extent that the waiver contemplates a subelement in the Transport element of Switched Access for a flat monthly charge for its signalling transfer point (STP) port charge. However, we deny Southwestern Bell's CCS interconnection waiver in part, to the extent that it assumes that a dedicated switched transport service can be tariffed as Special Access. We grant these waivers on an interim basis, pending the outcome of the Commission's rulemaking proceedings in CC Docket Nos. 91-115,[1] 91-141, [2] and 91-213.[3]

II. LIDB WAIVER PETITION

A. Introduction

3. LIDB is a database created by local exchange carriers (LECs). The LECs' databases are interconnected, in order to enable LECs to share with each other and with interested third parties data on the account status [4] of LEC joint use calling cards,[5] as well as information on line numbers, such as third party billing exceptions. [6] This information is stored in LIDB and updated by the LECs on a regular basis. LIDB service will enable LEC customers such as interexchange carriers (IXCs) to query the database to determine whether a caller is the authorized user of a valid LEC joint use calling card, or whether a particular telephone number can accept collect or third-party billed calls, before transmitting any call using that card.

B. Pleadings

1. Petition

4. Southwestern Bell seeks a waiver to establish two new rate elements for its LIDB service. The non-recurring costs would be recovered through a LIDB Access Service Establishment Charge and the recurring costs would be recovered through a LIDB Query Charge, which would apply to each request to validate a calling card transmitted by a customer to Southwestern Bell's LIDB. Southwestern Bell Petition at 1-2. The Query Charge would be a per query charge rather than a flat rate or a minutes of use (MOU) charge. *Id.* at 4-5. This charge would be designed to recover the costs of a portion of the STP allocable to LIDB validation service, the link from the STP to the service control point (SCP) where the LIDB database resides, SCP port, LIDB-specific costs of the SCP, and costs associated with updating LIDB to reflect current information regarding the status of the line account. *Id.* at 5. The LIDB Access Service Establishment Charge would recover the costs associated with assigning originating point codes to IXCs and other parties wishing to validate Southwestern Bell calling cards. *Id.* These rate elements would be separate access elements, rather than subelements of an existing Part 69 access element. *Id.* at 6.

2. Early Comments

5. Several Bell Operating Companies (BOCs) filed comments on Southwestern Bell's petition prior to the release of the Public Notice establishing a pleading cycle for the petition. [7] Many parties argue that LIDB Access Service is a detariffed billing and collection function and that Southwestern Bell should not be allowed to tariff it. Ameritech Opposition at 1-3; Pacific Bell Comments at 1-2; Bell Atlantic Opposition at 1-3; BellSouth Comments

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[1] *See* Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rulemaking, CC Docket No. 91-115, 6 FCC Rcd 3506 (1991) (*Cincinnati Bell Rulemaking*).

[2] *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking, 6 FCC Rcd 3259 (1991) (*Expanded Interconnection Rulemaking*).

[3] MTS and WATS Market Structure, CC Docket No. 78-72 and Transport Rate Structure and Pricing, CC Docket No. 91-213, released August 30, 1991 (*Transport Rulemaking*).

[4] *See* Cincinnati Bell Telephone Co., CC Docket No. 89-323, 6 FCC Rcd 3501, 3501 n. 2 (1991) (*Cincinnati Bell Final Order*)

[5] *See Cincinnati Bell Rulemaking*, 6 FCC Rcd at 3506 n. 1.

[6] *Cincinnati Bell Rulemaking*, 6 FCC Rcd at 3507 n. 4.

[7] These BOCs are the Ameritech Operating Companies (Ameritech); The Bell Atlantic Telephone Companies (Bell Atlantic); The BellSouth Telephone Companies (BellSouth); New England Telephone and Telegraph Company and New York Telephone Company (together, NYNEX); and Pacific Bell.

at 3, NYNEX Comments at 1-3. [8] Pacific Bell claims that Southwestern Bell's proposed rate elements "appear to be local transport." Pacific Bell maintains that Southwestern Bell can take advantage of the general transport waiver granted in 1985, and does not need to file a waiver to establish LIDB calling card validation service. [9] Pacific Bell Comments at 1-2.

6. BellSouth requests that the Bureau's action on Southwestern Bell's waiver leave BellSouth free to separate LIDB access from transport between the IXC POP and the LIDB. BellSouth Comments at 1-3. NYNEX argues that the Commission's rationale for detariffing billing and collection applies equally to LIDB and that the Commission should therefore detariff LIDB as well. NYNEX maintains that LIDB is a financial or administrative service rather than a communications service because customers of the LIDB service are not able to "communicate or transmit intelligence of their own design and choosing." NYNEX claims this is the reason that the Commission found that billing and collection is not a communications service, and that LIDB should therefore be treated in the same fashion.[10]

3. Reply

7. In response to these early pleadings, Southwestern Bell argues that the *Billing and Collection Order* cited by the BOCs established a narrow definition of detariffed billing and collection services that does not include the activities and functions associated with LIDB service. Southwestern Bell Reply at 3, *quoting Billing and Collection Order*, 102 FCC 2d at 1152 n. 2. Southwestern Bell also argues that LIDB Access Service is distinguishable from the activities discussed in the *Billing and Collection Order*, because those activities do not use wire or radio facilities as LIDB Access does. *Id.* at 34, *quoting Billing and Collection Order*, 102 FCC 2d at 1168.

8. Southwestern Bell disagrees with the claim that the Transport Waiver applied to the rate elements Southwestern Bell proposes to create. Southwestern Bell argues that the blanket transport waiver allows carriers only to combine common and dedicated transport into a single rate element, not to establish new Part 69 access rate elements for new services. *Id.* at 8. Southwestern Bell disagrees with NYNEX that LIDB Access Service is a financial or administrative service within the meaning of the *Billing and Collection Order*. Southwestern Bell argues that customers of LIDB Access Service, or IXCs, do transmit "intelligence" of their own choosing, namely, the calling card number proffered to the IXC by the end user and the routing information necessary to insure that the query and the response are properly routed. *Id.* Southwestern Bell also argues that tariffing LIDB Access Service is consistent with the Bureau's *Cincinnati Bell Investigation Order* and *Pacific Bell Order*. [11]

4. Comments Filed in Response to the Public Notice

9. Eight parties filed comments in response to the Public Notice. [12] Most of these parties support Southwestern Bell's petition. These parties first argue that LIDB is not a billing and collection activity for purposes of the *Billing and Collection Order*. They note that LIDB access does not fall within the definition of "billing and collection services" in the *Billing and Collection Order*. CNS Comments at 3-4; ITI Comments at 6; OSPA Comments at 45; Sprint Comments at 3. These parties also note that subscription to LIDB access service does not obviate the need for billing and collection services. CNS Comments at 5 n. 7; OSPA Comments at 5-6; OAN Comments at 6; Sprint Comments at 6; MCI Opposition at 3-4.

10. Several parties argue that the rationale underlying the *Billing and Collection Order* does not apply to LIDB. CNS cites the *Billing and Collection Order* for the proposition that the use or nonuse of wire or radio facilities is a factor in determining whether a particular service falls under the Commission's Title II jurisdiction. CNS Comments at 5, *citing Billing and Collection Order*, 102 FCC 2d at 1169. CNS also notes that under this test, LIDB access service would be a Title II activity. *Id.* Sprint distinguishes LIDB access service from billing and collection service because LIDB access service helps to determine if a call should be completed, while billing and collection services are used after the call is completed. Sprint Comments at 3. ITI maintains that, since LIDB access service provides access to a database, it is an "Access Service" which must be tariffed. ITI Comments at 34. Many parties also argue that LIDB access service should be tariffed because it is analogous to the automatic number identification (ANI) function of Feature Group D in that it is necessary for the completion of some calls. OAN Comments at 7; Sprint Comments at 2-3; MCI Opposition at 3-4. In addition, these parties maintain that the BOCs have a "bottleneck" monopoly on the information in LIDB, and fear that LECs will not offer LIDB service on a nondiscriminatory basis unless the service is tariffed. CNS Comments at 7; ITI Comments at 7-8; OSPA Comments at 8; Sprint Comments at 5. Several parties maintain that the Bureau found LIDB to be a Title II activity in the *Cincinnati Bell Investigation Order* and the *Pacific Bell Order*. ITI Comments at 5; OSPA Comments at 6-7; OAN Comments at 4-5; Sprint Comments at 4; MCI Opposition at 2-3.

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[8] Ameritech contends that granting Southwestern Bell's LIDB waiver would prejudge two rulemaking proceedings currently in progress. Ameritech Opposition at 4. The Commission subsequently acted in the two proceedings cited by Ameritech.

[9] In 1985, the Commission established a transport waiver. *See* MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 85-87, 58 RR 2d 917, 922 (1985) (extending indefinitely the waiver of rules governing the computation of local transport access charges established in AT&T Petition for Waiver of §§ 69.1(b), 69.3(c), 69.4(b)(7) and (8), 69.111 and 69.112 of the Commission's Rules and Regulations, 94 FCC 2d 545 (1983)). That waiver was recently modified by the *Transport Order*.

[10] NYNEX Comments at 2, *citing* Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150, 1168 (1986) (*Billing and Collection Order*).

[11] *Id.* at 5-6, *citing* Cincinnati Bell Telephone Company, Revisions to Tariff F.C.C. No. 35, CC Docket No. 89-323, 5 FCC Rcd 805 (Com. Car. Bur. 1990) (*Cincinnati Bell Investigation Order*, Revisions to Tariff F.C.C. No. 128, 5 FCC Rcd 4060 (Com. Car. Bur. 1990) (*Pacific Bell Order*).

[12] These parties are MCI; Capital Network Systems (CNS); International Telecharge, Inc. (ITI); National Telephone Cooperative Association (NTCA); Operator Service Providers of America (OSPA); Operator Assistance Network (OAN); US Sprint Communications Company Limited Partnership (Sprint); and GTE Service Corporation and its affiliated telephone companies (GTE).

11. The parties supporting Southwestern Bell's LIDB petition also criticize arguments made by the BOCs who filed prior to the Public Notice. CNS and ITI maintain that transport to the LIDB database cannot be separated from the LIDB access as BellSouth suggests. CNS Comments at 6; ITI Comments at 5. ITI also contends that the transport waiver cited by Pacific Bell waived only the distinction between common and dedicated transport, not the need to request waivers to establish other rate elements. *Id.* at 4-5. Sprint disputes that LIDB access service belongs in Local Transport. Sprint Comments at 7.

12. GTE and MCI oppose Southwestern Bell's petition. MCI agrees that LIDB access should be tariffed, but opposes Southwestern Bell's petition on the grounds that Southwestern Bell's illustrative tariff does not provide for IXC direct connection to the database and is unreasonably vague. MCI Opposition at 5-6. MCI claims Southwestern Bell plans to tariff LIDB only in Missouri, and MCI asserts that Southwestern Bell has not explained how it will share revenue among its states. *Id.* at 10.

13. GTE opposes Southwestern Bell's petition because it contends LIDB access service is billing and collection. GTE Comments at 1-4. GTE claims that several LECs have developed or are developing LIDB databases, and that LIDB information is currently available to any carrier under contract. From this, GTE concludes that LIDB access service is competitive and should not be tariffed. *Id.* at 6.

5. Replies

14. Ameritech, Bell Atlantic, GTE, ITI, and Southwestern Bell filed replies. Ameritech, Bell Atlantic, and GTE contend that the *Cincinnati Bell Investigation Order* did not reach the issue of whether LIDB calling card validation was billing and collection. Ameritech Reply at 2-3; Bell Atlantic Reply at 5-6; GTE Further Comments at 4-5. Ameritech emphasizes that it does not oppose the tariffing of transport to the LIDB database, only the tariffing of the provision of LIDB data. Ameritech Reply at 1-2.

15. Some replies argue that LIDB validation should not be tariffed in any case. GTE asserts that the statement in the *Pacific Bell Order* that validation is "apparently subject to regulation under Title II" is dicta. *Id.* at 5. Bell Atlantic disputes CNS's claim that LIDB access service must be classified as a Title II activity to prevent discrimination, arguing that the service could be regulated under Title I. Bell Atlantic Reply at 6-7. Bell Atlantic contends that credit card validation is not a useful service unless used in conjunction with the BOC's billing and collection service, because use of a different billing service would require the end user to receive separate telephone bills from two separate billing agents. Bell Atlantic Reply at 3-5. GTE argues that calling card validation should not be treated as a common carrier service simply because the IXCs need it to avoid subjecting themselves to fraud. GTE asserts that the appropriate test for common carrier services is not "necessity," but rather the number of competitors providing the service. GTE also asserts that there are three providers of validation services currently in existence. GTE Further Comments at 3-4. GTE also contends that the parties supporting Southwestern Bell's petition misconstrue the *Cincinnati Bell Investigation Order* and the *Pacific Bell Order*. GTE construes the *Cincinnati Bell Investigation Order* as holding only that the 10-digit telephone number must be provided on a non-discriminatory basis. *Id.* at 4-5. Finally, GTE contends that MCI's analogy between LIDB access service and ANI is not accurate. According to GTE, ANI identifies the point of origination, while LIDB access service does not. *Id.* at 5-6.

16. ITI repeats that it considers LIDB access service to be a Title II service. ITI Reply at 1. ITI maintains that LIDB service is not within the scope of the *Billing and Collection Order*, making the arguments summarized in Section II. B. 4. of this Order, *supra*. ITI argues that LIDB access must be tariffed to insure that it is provided on a nondiscriminatory basis. *Id.* at 67. ITI calls GTE "irresponsible" for advocating a system in which use of invalid or fraudulent calling cards is not discouraged. *Id.* at 7. Finally, ITI reiterates its support for a rulemaking. *Id.* at 9-10.

17. In its further reply, Southwestern Bell observes that a rulemaking would unnecessarily delay the introduction of this service. Southwestern Bell Further Reply at 2-3. It also asserts that CNS is mistaken in assuming that the availability of LIDB access service is "several years away." *Id.* at 3. Southwestern Bell calls the establishment of a rate element through a waiver request a "fairly routine form of relief," and denies that its waiver request is a significant change in the Commission's Rules that would require a rulemaking. *Id.* at 3-4. Southwestern Bell suggests that comments in a waiver proceeding are not the appropriate place to request a rulemaking. *Id.* at 4. Southwestern Bell also notes that we can grant its waiver subject to the outcome of any future rulemaking. *Id.* at 5.

C. Discussion

18. We reject arguments that Southwestern Bell's LIDB petition is inconsistent with the Commission's *Billing and Collection Order*. As Southwestern Bell notes, the *Billing and Collection Order* specifically defined the billing and collection activities affected by the *Order* as follows:

> recording IC message detail, aggregating the details to create individual messages (a completed call originated by an IC's end user), applying the IC's rates to such messages, processing these rated messages into customer invoice form, mailing bills, collecting payments, accepting customer deposits, handling customer inquiries and investigating billing evasion activities.

Billing and Collection Order, 102 FCC 2d at 1152 n. 2. The Commission's definition of detariffed activities did not include the services and activities that would be included in Southwestern Bell's LIDB service. Therefore, the other LECs' reliance on that Order is misplaced.

19. Moreover, we disagree that the rationale of the *Billing and Collection Order* should apply to LIDB activities. In the *Cincinnati Bell Final Order*, the Commission held that the activities and services associated with generating, maintaining, and providing access to, calling card validation information for LEC joint use cards are an integral part of exchange access and therefore are subject to the requirements of Title II of the Communications Act. *Cincinnati Bell Final Order*, 6 FCC Rcd at 3504, para. 23. The LECs' LIDB service is simply one method of providing the Title II access services described in the *Cincinnati Bell Orders*. Southwestern Bell is proposing to provide LIDB service in a manner consistent with its Title II obligations by tariffing the rate elements and rate struc-

tures described in this petition. Thus, Southwestern Bell's waiver petition is consistent with Title II of the Communications Act and an untariffed LIDB service would not be consistent with the relevant Commission precedent.

20. No party argues that the rate structure proposed by Southwestern Bell is inconsistent with Southwestern Bell's Title II obligations. [13] Part 69 of the Commission's Rules does not establish the rate structure for the service Southwestern Bell proposes. Therefore, Southwestern Bell has shown good cause, within the meaning of Section 1.3 of the Commission's Rules, for waiving Part 69 to permit the establishment of rate elements for LIDB validation service. [14] Accordingly, we hereby grant Southwestern Bell a waiver to establish new Part 69 rate elements for LIDB service. [15]

21. We have concluded that the precise subelements described in the Southwestern Bell petition would not be optimal. Southwestern Bell's petition proposes two elements for LIDB access: a nonrecurring charge for service establishment costs, and a single per query charge to recover costs of STP facilities allocable to LIDB, transport from STP to SCP, and costs of maintenance and updating the SCP itself. The costs underlying the per query charge may be recovered through two separate charges, one for the STP facilities and the transmission lines dedicated to LIDB, and one for the SCP costs. While we do not preclude Southwestern Bell from requiring that customers pay both charges to obtain LIDB service, our waiver of the Rules to permit the creation of these charges is an interim waiver pending the outcome of other Commission proceedings, which may or may not require that these elements be offered separately.

III. CCS INTERCONNECTION WAIVER

A. Introduction

22. Both the LECs and the IXCs have developed common channel signalling (CCS) networks which operate as part of their switched networks to assist in the routing and delivery of telecommunications traffic. Many of the carriers' services that use CCS network capabilities (including LIDB) will require the LECs and their customers to interconnect their CCS networks. CCS interconnection service consists of a 56 kilobit per second (kbps) dedicated link connecting the IXCs' CCS networks to the LEC signalling transfer points (STPs). This service can be used by the LEC to transmit out-of-band signalling information to IXCs, which provides IXCs with faster call set-up than is possible with in-band signalling. CCS interconnection service also enables the IXC to transmit queries to LEC databases, like the queries an IXC sends to LIDB, for purposes of calling card validation or third party billing information.

B. Pleadings

1. Petition

23. Southwestern Bell seeks a waiver of the Commission's Part 69 access rules to establish CCS interconnection service providing transmission between an IXC signalling point of interface (SPOI), the point at which the LEC's and IXC's CCS networks meet, and Southwestern Bell's STP. Southwestern Bell CCS Petition at 1 n. 3, *citing* 47 C.F.R. §§ 69.4(b), 69.111, 69.112. There are two parts of Southwestern Bell's service: the "STP Access Mileage" and "STP Port Termination." *Id.* at 2. Southwestern Bell plans to provide STP Access Mileage as a Special Access service pursuant to its Special Access tariffs. Therefore, Southwestern Bell believes it does not need a waiver of any Part 69 rule to offer this part of its service. *Id.* at 2-3. Southwestern Bell would provide STP Port termination as a new subelement in the Transport element. Southwestern Bell would create a flat monthly fee for its port charge. *Id.* at 3.

2. Comments

24. Metropolitan Fiber Systems (MFS) opposes Southwestern Bell's petition to the extent that Southwestern Bell has not specifically stated that it would offer STP "Port" service and STP Access Mileage on an unbundled basis. MFS Comments at 1-5.

25. MCI Telecommunications Corp. (MCI) challenges Southwestern Bell's waiver on four grounds. First, MCI cites Bell Atlantic Telephone Companies, Petition for Waiver of Sections 69.106 and 69.205 of the Commission's Rules To Permit a Call Setup Charge, 4 FCC Rcd 7210 (Com. Car. Bur. 1989), for the proposition that significant changes to Part 69 should be made in a rulemaking proceeding rather than a waiver proceeding. MCI Comments at 2-4. Second, MCI also claims that in *RAO Letter 6*, [16] Southwestern Bell characterized STPs as packet switches and argued that STP costs should be placed in Account 2212, Tandem Switches, and recovered through Local Transport charges. MCI interprets this as evidence that Southwestern Bell is currently recovering STP costs through Local Transport charges, and argues that Local Transport charges should be reduced when the STP Port element is established to prevent double recovery. *Id.* at 4-5. Third, MCI contends that a flat port rate would force small users to cross-subsidize large users, and that this would violate the "equal per unit" provisions of the MFJ.

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[13] MCI does not argue that LIDB validation service will not enable Southwestern Bell to comply with Title II. Instead, MCI challenges Southwestern Bell's illustrative tariff filed as an appendix to its waiver. Such challenges are untimely, since these issues do not arise until Southwestern Bell files its LIDB tariff.

[14] Rules may be waived if there is "good cause" to do so. See Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. *See* Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[15] Southwestern Bell's tariff filing implementing this waiver must comply with the Commission's Rules governing cost support material for new services. *See* Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, CC Docket No. 87-313, 6 FCC Rcd 2637, 2694-96 (1991) (*LEC Price Cap Reconsideration)*; Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, 6 FCC Rcd 4524, 4531 (1991).

[16] Responsible Accounting Officer Letter No. 6, released June 26, 1987, amended February 27, 1989 (Federal Communications Commission, Common Carrier Bureau, Accounting and Audits Division).

Id. at 6-7. Finally, MCI argues that Southwestern Bell's waiver request for establishment of rate elements for LIDB is vague concerning direct connection to databases. *Id.* at 8-9.

26. Advanced Telecommunications Corp. (ATC), a small IXC, opposes recovery of CCS investment in a separate rate element. ATC claims AT&T has SS6 capabilities unavailable to its competitors. Therefore, according to ATC, AT&T is not as likely as its competitors to order CCS out-of-band signaling at all locations. ATC concludes that because of this, a separate STP rate element will recover more STP costs from IXCs other than AT&T, and that this would violate the "equal per unit" provisions of the MFJ. ATC Comments at 3-4. ATC also contends that a distance-sensitive charge for the connection from the IXC POP to the STP may increase access charges for some IXCs, and therefore this should be a flat rate. *Id.* at 4. Finally, ATC maintains that the Bureau should not act on Southwestern Bell's waiver petition until the MFJ Court determines whether the MFJ requires an STP in every LATA. *Id.* at 4-5.

3. Replies

27. In its reply, AT&T maintains that the availability of CCS services should not be delayed until the completion of a rulemaking proceeding. AT&T advocates granting Southwestern Bell's CCS waiver subject to the outcome of any later rulemaking. AT&T Reply at 2. Southwestern Bell replies that MCI's argument regarding double recovery is applicable only to tariff filings, not waiver requests, and promises to submit the necessary cost support information with the tariff if we grant this waiver. Southwestern Bell Reply at 3.

28. Southwestern Bell asserts that the MFJ "equal per unit" rule is not applicable to CCS services, and that a flat rate will not force small users to cross-subsidize large users in any case because ports will be dedicated to particular customers. *Id.* at 4-5. Southwestern Bell maintains that the ports have limited capacity, so large users will buy more ports than small users and therefore more costs will be recovered from large users. *Id.* at 7-8. Southwestern Bell also denies ATC's allegation that Southwestern Bell offers access services to AT&T that are not available to other IXCs, or that Southwestern Bell offers SS6 services to any IXCs. *Id.* at 8-9. Southwestern Bell alleges that it cannot allow direct connection to databases for security reasons. *Id.* at 10. Southwestern Bell also claims that its STPs will be colocated with existing access tandems in the two LATAs in which CCS services will be introduced, and claims that ATC's concerns about distance-sensitive access charges are unfounded because of this. *Id.* at 10-11. Finally, Southwestern Bell repeats that the standard for granting petitions for waiver is "good cause," and asserts that it has met this standard. *Id.* at 12-13.

C. Discussion

29. Southwestern Bell has shown good cause for its request to establish a new Transport subelement for STP Port Termination. The Commission may exercise its discretion to waive a rule whenever particular facts would make strict compliance inconsistent with the public interest. [17] CCS interconnection will enable Southwestern Bell to provide faster call set-up than is currently available. CCS interconnection will also facilitate non-discriminatory access to LIDB, as well as other databases to be developed in the future. The existing access rules were not designed for this service and the creation of a separate port element will be consistent with the underlying purposes of the rules. A separate rate element would ensure that the costs of the STP port are recovered from the "cost causer," *i.e.*, the customer ordering the dedicated port. Similarly, since the port will be dedicated to a particular customer, Southwestern Bell will not incur those costs on a usage-sensitive basis. Thus, it is reasonable to establish a flat rate to recover those costs. Therefore, we grant Southwestern Bell's CCS interconnection waiver to the extent it would establish a new, flat-rated subelement in the Transport element for STP port termination.

30. However, Southwestern Bell has not shown good cause for providing STP Access Mileage as a Special Access service. As the Bureau found in the *GTE Order* we also release today,[18] Part 69 of the Commission's Rules provide explicit instructions for the establishment of access charges. The Commission rules specify that Special Access charges apply to certain types of facilities; for example, private lines that terminate in a private branch exchange (PBX) facility, or interstate wide area telephone service (WATS) lines, or telex. [19] Most access facilities that are used for switched interstate services are not classified as Special Access. [20] The link between an IXC SPOI and a LEC STP that Southwestern Bell calls STP Access Mileage will be used to deliver, or facilitate the delivery of, switched services offered by IXCs. Therefore, Southwestern Bell's petition will be granted on condition that STP Access Mileage be provided as a Transport subelement rather than a Special Access element. We agree with Southwestern Bell, however, that the facilities are used on a dedicated basis and therefore the charge for the service should be a flat-rated charge per customer. Therefore, the costs of STP Access Mileage are properly recovered as a new dedicated transport subelement in the Transport element. Those costs may be recovered on a flat, per line basis.

31. In the *Transport Rulemaking*, the Commission established three goals for switched transport pricing. Any rules governing switched transport rates should promote efficient use of facilities by allowing the LECs to price in the manner that best reflects the way in which costs are incurred, should be conducive to full and fair interexchange competition, and should not interfere with the development of access competition. Flat rate charges for the CCS interconnection service satisfy those goals.

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[17] WAIT Radio v. FCC, 418 F.2d at 1159 (D.C. Cir. 1969).

[18] General Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, DA 92-1259, released October 4, 1991 (Com. Car. Bur.).

[19] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 314-15 (1983).

[20] *Id.* at 309.

32. First, a flat rate appears to reflect the manner in which costs are incurred, thereby promoting efficiency, since the CCS interconnection link is dedicated to the use of a single customer, and its costs do not appear to be usage-sensitive. Second, a flat rate will not interfere with full and fair interexchange competition. To the extent that the links are used for LIDB service, Southwestern Bell has indicated that it will deploy only one LIDB in its region,[21] and accordingly, IXCs need only order one set [22] of 56 kbps links, with associated ports, in order to receive Southwestern Bell's LIDB service. [23] Even when these facilities are used for other services, such as out-of-band signalling, IXCs will need to order much less of the capacity required for the associated communications path. Thus, the total costs of these links to IXCs will be relatively small, and should not adversely affect interexchange competition. Finally, a flat rate will not interfere with the development of access competition, and therefore, the Commission's third goal is also satisfied.

33. When the Commission applied its three goals to the transmission services at issue in the *Transport Rulemaking*, the Commission concluded that pricing should remain on a per-minute basis pending further Commission action. In reaching that conclusion, the Commission had to strike a balance among its three goals, since some goals would be satisfied by flat rate pricing, while other goals would be better served by a usage-based rate structure. In this case, however, there is no need to balance countervailing considerations in evaluating whether to price the signalling link on a flat rate basis, since flat rate pricing satisfies all three of the Commission's goals. Thus, while the bottom-line result differs from that of the *Transport Order*, pricing the signalling link on a flat rate basis does not conflict with the Commission's goals in the *Transport Proceeding*. We accordingly waive the requirements of that Order to the extent necessary to enable Southwestern Bell to tariff the elements permitted by this Order. Accordingly, we will grant a waiver of the requirements of the *Transport Order* to permit Southwestern Bell, and any other LEC, to offer the IXC SPOI to LEC STP link and the STP port on a flat rate basis. We note, however, that this waiver is subject to the Commission's ultimate decision in the *Transport Rulemaking* on the appropriate rate structure for transport. [24]

IV. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, filed by Southwestern Bell Telephone Company, to establish rate elements for LIDB calling card validation service, IS GRANTED.

35. IT IS FURTHER ORDERED, that the petition for waiver of Part 69 of the Commission's Rules, filed by Southwestern Bell Telephone Company, to establish rate elements for CCS interconnection service, IS GRANTED, to the extent indicated above, and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[21] The other BOCs have also indicated that they will deploy only one LIDB in each of their regions, such that only one set of links per region would be necessary for each IXC. Moreover, the LECs plan to interconnect their LIDBs through entities they call "hub providers." In view of these plans, an IXC could choose to connect only with a hub network, rather than with each LIDB, further reducing the number of links needed.

[22] Since the LEC STPs that are connected to the LIDBs are deployed in mated pairs, a link to a LIDB will require links to both of the LEC STPs connected to the LIDB.

[23] The capacity of one link set appears sufficient to handle all LIDB queries from an IXC to Southwestern Bell, with the possible exception of AT&T who may need to order more than one.

[24] Southwestern Bell may also require CCS interconnection service customers to purchase both STP access mileage service and STP port termination service, provided ICs are permitted to place their SPOIs wherever they please, pending further Commission action.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell
Telephone Company

Petition for Waiver of Part 69
of the Commission's Rules for
Information Surcharge Element

ORDER

Adopted: October 4, 1991; Released: October 9, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On December 3, 1990, Southwestern Bell Telephone Company (SWB) requested a waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to the extent necessary to permit the establishment of an Information Surcharge rate element within the Information category. Specifically, SWB seeks a waiver of Sections 69.4(b) and 69.109 of the Commission's Rules, 47 C.F.R. §§ 69.4(b) and 69.109. [1]

2. SWB states that the interstate portion of its white pages publication expense is presently assigned to the Information cost category of Part 36, 47 C.F.R. Part 36, which is recovered through the Interexchange Directory Assistance (IDA) service charge. SWB Petition at 1-2. It asserts that recovering these publication costs in that manner is contrary to the principle that cost causers should be responsible for their payment. *Id.* at 2. Further, SWB contends that the basic expense associated with publication of white pages is incurred on behalf of all end users, and that cost recovery should be obtained from all IXCs for flow through to their end user customers. *Id.* at 23. SWB adds that it plans to introduce and market "several new products" in its white pages publication that will cause additional expense. It argues that removing "a portion" of the white pages publication expense that is not associated with IDA service provision would help to mitigate the wide price fluctuations that it believes will occur as a result of new product expense. *Id.* at 2.

II. PLEADINGS

3. Allnet Communications Services, Inc. (Allnet) filed an opposition to SWB's waiver request on December 17, 1990. [2] It asserts that SWB has not met the requirements for granting a rule waiver, and adds that SWB did not explain the structure of its proposed rate element. Allnet Opposition at 1-2. Allnet contends that the true cost causers are SWB's local service ratepayers, and that interstate carriers and end users in other states should not bear the costs associated with white pages publication. According to Allnet, the directory assistance rate element is a more appropriate vehicle for recovery of white pages costs than cost recovery via a general access usage-based charge. *Id.* at 2. It adds that SWB's proposed rate element would facilitate cross-subsidization and urges examination of costs caused by SWB's non-regulated publishing affiliates. *Id.* at 3-4.

4. MCI filed comments addressing SWB's petition on January 29, 1991, that generally support SWB's waiver request. MCI Comments at 1. It agrees with SWB's assertion that white pages publication costs are not directly related to IDA, but suggests that SWB should provide adequate cost support at the time it tariffs the service to ensure that access customers do not cross-subsidize SWB's local directory assistance operations. *Id.* at 2-3.

5. SWB responded to Allnet's opposition on January 29, 1991. It asserts that the interstate portion of white pages publication expense is not directly related to IDA expense, and that the recovery of the interstate portion of that expense should be from a broader base of end users than just those who utilize directory assistance service. SWB Comments at 1-2. To the extent that the separations process assigns costs associated with white pages publication to the interstate jurisdiction, SWB continues, the interstate portion of white pages expense should be recovered from the total interstate access minutes of use (MOU) that are generated by all end users. [3] SWB's theory is that end users receiving a white pages publication also use interstate long distance service. *Id.* at 2. SWB further maintains that if the allocated white pages expenses are ultimately passed onto end users through the IXCs' charges, rather than through IDA charges, the historical price fluctuations in the IDA charge would be eliminated. *Id.* at 2-3. SWB adds that collecting white pages expenses through either the IDA charge or through a total access MOU charge would not increase possibilities for cross-subsidization. *Id.* at 3.

III. DISCUSSION

6. The Bureau has previously granted waivers similar to the one SWB requests. [4] In 1985, we granted certain carriers permission to remove from the Information category those costs which they believed -- and could establish

[1] Section 69.4(b) describes the access service rate elements local exchange carriers must charge. Section 69.109(a) requires that costs associated with the Information element be met through charges assessed on IXCs that are "connected to assistance boards through interexchange directory assistance."

[2] The Bureau issued a Public Notice soliciting comments on SWB's petition after Allnet's opposition was received. Public Notice, Southwestern Bell Telephone Company Files Petition for Waiver Regarding Interstate Directory Assistance Service, 6 FCC Rcd 413 (Com. Car. Bur. 1991).

[3] SWB maintains that the direct costs associated with enhancements to the white pages publication beyond the basic white page listing will be recovered from the end user who has the requested enhanced listing. SWB Comments at 2.

[4] Petitions for Waiver Concerning 1985 Annual Access Tariff Filings, Mimeo No. 5007, released June 7, 1985, at para. 76-77 (*1985 Waiver Order*) (white pages costs not incurred in providing interstate directory assistance could be recovered through a separate Information Surcharge rate element based on usage).

-- were not incurred in the provision of IDA service. These removed costs included at least some portion of white pages publication costs. The Bureau stated that the carriers could recover those costs only through a separate Information Surcharge rate element, priced per access minute of use, with separate premium and non-premium rates. *1985 Waiver Order* at para. 76. The Bureau later extended this waiver indefinitely so that LECs could continue to recover non-interstate directory assistance information costs through an Information Surcharge. [5] As SWB's waiver request is similar to those previously granted by the Bureau, we therefore grant its request as well. We grant SWB's waiver, however, only to the extent that it conforms to the waivers granted other carriers earlier.

IV. ORDERING CLAUSE

7. ACCORDINGLY, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by Southwestern Bell Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[5] Annual 1989 Access Tariff Filings, Petitions for Waiver and Petition for Reconsideration, 4 FCC Rcd 413,414(1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access
Tariff Filings

GTE Operating Companies
Motion for Extension of Time

ORDER

Adopted: October 4, 1991; Released: October 11, 1991

By the Chief, Common Carrier Bureau:

1. On September 6, 1991, the GTE Service Corporation and its affiliated domestic telephone operating companies (GTOC) filed a motion for further extension of time to effectuate refunds ordered in the above-captioned proceeding until judicial review of the matter is completed. The motion is unopposed.

2. In December 1988, April 1989, and March 1990, the Commission directed GTOC to refund over $8 million for disallowances found in a review of its 1988 annual access tariff.[1] In the *December 1988 Order*, the Commission concluded that the GTOCs had applied an incorrect interpretation of the Commission's jurisdictional separations rules in computing circuit equipment revenue requirements for Central Office Equipment (COE) Category 4.23 investment. In the *April 1989 Order*, the Commission directed GTOC to refund $7.347 million. In March 1990, the Commission ordered GTOC to refund approximately $1.01 million to interstate customers based on each customer's share of 1988 local transport payments.

3. GTOC sought judicial review of the *December 1988 Order* and the *April 1989 Order*.[2] GTOC also petitioned the Commission for reconsideration of the *March 1990 Order*, which petition the Commission denied.[3] GTOC then filed a petition for review of both the *March 1990 Order* and *July 1991 Order*.[4]

4. The Common Carrier Bureau has granted GTOC's previous requests for extension of time for issuing the refunds in this proceeding. [5] The Bureau has reviewed GTOC's present motion and concludes that it is in the public interest to delay the deadline for refunds GTOC is required to make until judicial review of the matter is completed.

5. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. §154(i), that GTE Service Corporation and its affiliated domestic telephone operating companies ARE GRANTED an extension of time until judicial review of the matters at issue in CC Docket No. 88-1, Phase II, are completed. Grant of this extension is contingent upon GTE Service Corporation and its affiliated domestic telephone operating companies continuing compliance with the conditions set forth in the *September 1989 Order*.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order, 4 FCC Rcd 4115 (1988) (*December 1988 Order*), *recon.*, 4 FCC Rcd 3965 (1989) (*April 1989 Order*), *further recon.*, 5 FCC Rcd 2150 (1990) (*March 1990 Order*), *recon. denied*, 6 FCC Rcd 4156 (1991) (*July 1991 Order*).

[2] *Southern Bell Telephone Co., et al. v. FCC*, No. 88-1081 (D.C. Cir., filed Feb. 2, 1989).

[3] 6 FCC Rcd 4156 (1991) (*July 1991 Order*).

[4] GTOC Petition for Review, No. 91-1356 (D.C. Cir., filed Aug. 1, 1991).

[5] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Order, 4 FCC Rcd 2885 (Com. Car. Bur. 1990). *See also* 5 FCC Rcd 6004 (Com. Car. Bur. 1990) and 6 FCC Rcd 4415 (Com. Car. Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1991; Released: October 9, 1991

By the Chief, Common Carrier Bureau:

1. On May 17, 1991, the Bureau released our Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established a filing date of August 19, 1991, for price cap LECs' first automated quarterly service quality and annual infrastructure reports,[3] and a September 30, 1991, filing date for the second quarterly service quality report as well as the annual, infrastructure report covering calendar year 1989.[4] On August 30, 1991, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of some of the filing requirements for the September 30, 1991, infrastructure report covering calendar year 1989. In this Order we grant that petition. [5]

2. Ameritech states that it is unable to provide lines 480-484 (other transmission facility data) for 1989, since the mechanized system containing the data operates online and retains only certain historical information, not including the above. These lines were completed for Ameritech's 1990 infrastructure report, and will be included in all future reports. It is only the 1989 data that is unavailable.

3. We find that Ameritech has narrowly defined its waiver request and has shown good cause why it should be granted. We therefore grant Ameritech's request.

4. Accordingly, IT IS ORDERED that the request for waiver filed by the Ameritech Operating Companies in the above-captioned proceeding on August 30, 1991, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com. Car. Bur. 1991) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[3] On July 1, 1991, the price cap LECs filed the first quarterly service quality and annual infrastructure reports in hard copy only. This filing was reviewed by Bureau staff, and prompted the Bureau's Memorandum Opinion and Order of August 2, 1991, directing LECs to bring their filings into conformance with the Bureau's instructions or, where that is not possible, apply for waivers. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, DA 91-963, released Aug. 2, 1991 (*August 2 Order*).

[4] The infrastructure reporting requirements were derived by the Commission from a set of filing requirements originally established in CC Docket No. 89-624, the rate of return represcription proceeding. In that docket, the Bell Operating Companies and GTOC filed historical infrastructure data for each year from 1980 on, and projected data for each year until 1994. The reporting requirements for price cap LECs infrastructure reporting are very similar to those. The Commission decided that, in the interest of maintaining continuity in this data, price cap LECs should file historical infrastructure data to cover calender year 1989 (which was included in the Docket 89-624 data in projection, and would otherwise be excluded from historical data since it precedes these LECs' entry into price cap regulation).

[5] We granted a similar petition filed earlier by New York Telephone and New England Telephone and Telegraph Companies (together, NYNEX). In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Memorandum Opinion and Order, DA 91-1047, released Aug. 19, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The National Exchange Carrier Association, Inc.

Revisions To Tariff F.C.C. No.5 — Transmittal No. 457

ORDER

Adopted: October 10, 1991; Released: October 11, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On July 16, 1991, the National Exchange Carrier Association, Inc. (NECA) filed Transmittal No. 457, to add Operator Transfer Service (OTS) to NECA's Tariff F.C.C. No. 5. As proposed by NECA, participating local exchange carrier (LEC) operators would transfer 0- calls to the access customer, either the interexchange carrier (IXC) or operator services provider (OSP) requested by the end user. If the caller has no IXC or OSP preference, or if its preferred carrier does not subscribe to OTS, then the caller would be asked to select a carrier from a list of participating carriers. Transmittal 457 Description and Justification (D&J) at 2. The OTS charge as originally filed was to be $0.6290 per call transferred; as a result of its re-examination of cost support data submitted by its member companies, NECA lowered this charge to $0.46 per call transferred. [1] The tariff, as revised, is scheduled to take effect on October 14, 1991.

2. On July 30, 1991, US Sprint Communications Company Limited Partnership (US Sprint) filed a petition seeking suspension or rejection of NECA Transmittal 457. MCI Telecommunications Corporation (MCI) and Capitol Network System, Inc. (CNSI) filed petitions to reject or, in the alternative, suspend and investigate Transmittal 457 on July 31, 1991.

3. MCI argues that NECA has failed to include sufficient cost support to justify the proposed rate for its OTS service as required by Section 61.38(b) of the Commission's Rules, 47 C.F.R. § 61.38(b). MCI notes that NECA's proposed OTS rate is the highest in the country, and argues that NECA has failed to demonstrate that this "significantly excessive" rate is actually cost-based. MCI Petition at 2-3. MCI further states that NECA's cost support provides only the results of the survey NECA conducted of its member companies, and that it is impossible to determine from those data if companies responded to the survey correctly. *Id.* at 3. MCI charges that NECA has provided no information on operator work time, equipment costs, or how demand quantities were forecasted, and in particular, has failed to provide any assurances that it audited the results of the survey data. *Id.* Additionally, MCI argues that NECA has inflated its OTS costs by incorrectly including the costs of all outward operator services and by failing to assure that its member companies have supplied only OTS specific costs. *Id.* at 4.

4. CNSI complains that because many NECA member carriers refuse to bill and collect for other IXCs, AT&T will enjoy substantial advantages over other IXCs with respect to OTS. CNSI states that this billing practice results in a much higher call completion rate for AT&T than for the other IXCs, who are often assessed the transfer charge even though they cannot receive compensation for the call. CNSI Petition at 4-5. CNSI concludes that because of the NECA carriers' refusal to bill and collect for any IXC other than AT&T, NECA's OTS practice unlawfully discriminates in favor of AT&T and against AT&T competitors. *Id.* at 8.

5. US Sprint challenges NECA's OTS tariff on two grounds. US Sprint argues that NECA's proposed $0.6290 rate has not been adequately justified, in violation of Section 61.38 of the Commission's Rules, and is far in excess of rates charged by other LECs. US Sprint Petition at 1-2. In addition, US Sprint contends that NECA discriminates in favor of AT&T by making OTS available only with Feature Group C, but not Feature Group A or Feature Group B.

6. In its reply, filed on August 12, 1991, NECA asserts that its data satisfy the requirements of Section 61.38(b) for a 12 month projection of costs. NECA Reply at 2. [2] NECA explains that it obtained cost and demand results from its member companies through a NECA data request, and that its OTS revenue requirement is based on each company's interstate outward operator investment, taxes, return, and expenses from the non-access Interexchange category for the test period. *Id.* at 2. According to NECA, for companies completing the OTS study, OTS is the only "outward operator service" provided; therefore, only OTS revenue requirement is included in the rate calculation. NECA states that these costs have been allocated and assigned to the Interexchange category according to relative operator work seconds. *Id.* at 3. The demand used in rate development, says NECA, was based on analyses of actual calls or tests. *Id.* NECA defends its relatively higher OTS rates on the grounds that NECA companies are typically small, serve rural areas, and therefore cannot realize the same economies of scale as the large LECs. *Id.* at 4. NECA notes that its OTS rate is not inconsistent with other rates when comparative traffic volumes are taken into account. *Id.* at 4. NECA then states that its data were the best available and that to require extensive studies would impose an unnecessary burden on NECA companies. *Id.* at 5.

7. With respect to US Sprint's unreasonable discrimination claim, NECA maintains that the Bureau already considered this argument and found no discrimination. *Id.* at 7, *citing* Ameritech Operating Companies, Petition for Waiver of Section 69.4(b) of the Commission's Rules,

[1] NECA filed Transmittal No. 469 to lower its OTS charge on October 7, 1991.

[2] John Staurulakis, Inc. (JSI) also filed a pleading captioned as "Reply Comments of John Staurulakis, Inc." Because the JSI pleading is not a pleading authorized by Section 1.773(b) of the Commission's Rules, 47 C.F.R. § 1.773(b), which contemplates the submission of replies only by filing carriers, we dismiss the filing.

Transmittal Nos. 425, 467, *Memorandum Opinion and Order*, 6 FCC Rcd 1541, 1544 n. 15 (1991) (*OTS Waiver Order*). Finally, NECA claims that CNSI's assertion that NECA companies refuse to provide billing and collection services to IXCs other than AT&T is untrue. *Id.*

8. The Common Carrier Bureau has reviewed NECA Transmittal No. 457, the Description and Justification supporting it, and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that an investigation is not warranted at this time.

9. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate the National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 457, filed by MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, and Capital Network System, Inc., ARE DENIED.

10. IT IS FURTHER ORDERED that the reply comments filed by John Staurulakis, Inc., ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sprint International Communications Company Revisions to Tariff F.C.C. No. 1

Transmittal No. 2

ORDER

Adopted: October 11, 1991; Released: October 11, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On August 15, 1991, Sprint International Communications Company (Sprint) filed Transmittal 2 to increase some of its rates for terminating international inbound packet messages on its domestic network. Sprint provides international packet switched data services through its own network and through interconnection with carriers which provide primarily international services. Transmittal 2 is scheduled to become effective on October 16, 1991.

2. On August 23, 1991, TRT/FTC Communications, Inc. (TRT/FTC) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 2. TRT/FTC argues that Transmittal 2 would produce unlawful discrimination. It also avers that, while the filing is a rate increase, Sprint incorrectly labels the rates as new rates. TRT/FTC Petition at 3-6. TRT/FTC further asserts that, while suspension or rejection would not harm users, permitting the tariff to become effective would irreparably injure international packet carriers which would be forced to operate at a loss in some markets. It also maintains that the increased rates would provide a disincentive for United States international carriers to propose or agree to reductions in international accounting rates for packet services, and would impede the successful implementation of the Commission's recent directive to service providers to negotiate lower accounting rates with their foreign correspondents. *Id.* at 6-8. [1]

3. Sprint replies that TRT/FTC has not made the showing required to suspend or reject the tariff of a non-dominant carrier.[2] It contends that varying rates are customary in the industry, and that it labeled its rates as new because it had not previously listed separate rates for individual countries. *Id.* at 3-5. Further, Sprint argues, because other enhanced services could provide TRT/FTC an alternate method of reaching Sprint's customers, TRT/FTC has not shown that the harm to competition exceeds the harm which would occur if the service were unavailable. Sprint also contends that TRT's potential loss of revenue does not constitute the irreparable harm required to suspend a tariff filing, and that it is common practice in the industry for carriers to carry some traffic at a loss. *Id.* at 6-8. Finally, Sprint argues that TRT/FTC has failed to show that suspension of the tariff would not otherwise be contrary to the public interest, and that since its service is domestic, it is not involved in negotiations regarding international accounting rates. *Id.* at 8-9.

4. The Common Carrier Bureau has reviewed Sprint Transmittal 2 and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate the Sprint Tariff F.C.C. No. 1, Transmittal No. 2, filed by TRT/FTC Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

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[1] *Citing* Regulation of International Accounting Rates, Report and Order, 6 FCC Rcd 3552 (1991).

[2] Sprint Reply at 1-2. Sprint is a non-dominant carrier whose tariffs are subject to streamlined tariff review treatment. *See* International Competitive Carrier Policies, CC Docket No. 85-107, 102 FCC 2d 812 (1985), *recon.*, 60 RR 2d 1435, (1986). Sprint is allowed, therefore, to file rate revisions on 14 days' notice, and its tariff filings are presumed lawful under the Commission's Rules. Such tariffs will not be suspended unless a petitioner demonstrates: (1) that there is a high probability the tariff would be found unlawful after investigation; (2) that the harm alleged to competition if the tariff were to take effect would be more substantial than the injury to the public; (3) that irreparable injury will result if the tariff filing is not suspended; and (4) that the suspension would not otherwise be contrary to the public interest. 47 C.F.R. § 1.773(a)(ii).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell — Transmittal No. 1544
Tariff F.C.C. No. 128

ORDER

Adopted: October 16, 1991; Released: October 16, 1991

By the Chief, Common Carrier Bureau:

1. By Transmittal 1544, Pacific Bell (PacBell) will offer a new option under which it will unblock, at a customer's request, 0+900 access to that customer's 900 NXX code. [1] As a result, PacBell's customers, specifically 900 transport providers, will be able to receive 0+900 calls; currently, these customers can only receive 1+900 calls. Because Transmittal 1544 would make access for 900 services available on a 0+ basis, end users would be able to charge 900 calls to calling cards. Tr. 1544 Description and Justification (D&J) at Section 1.

2. PacBell does not plan to create a new rate element for the instant unblocking option. *Id.* According to PacBell, the only expenses incurred to provide this service are associated with upgrading switches to make them capable of processing 0+ dialing patterns for 900 calls. *Id.* at Section 2.1. Transmittal 1544 is scheduled to become effective on October 17, 1991.

3. On August 5, 1991, US Sprint Communications Company Limited Partnership (Sprint) filed a petition to suspend and investigate Transmittal 1544. Specifically, Sprint believes that the apparent conversion by American Telephone and Telegraph Company (AT&T) of the calling cards it shares with the Bell Operating Companies (BOCs) to proprietary cards which can only be validated by AT&T will give AT&T the largest share of calling cards. Consequently, Sprint argues, AT&T will be able to handle a greater volume of 0+ 900 calls than any other interexchange carrier (IXC), thereby affording AT&T a significant competitive advantage in marketing its transport service to 900 information providers. Sprint Petition at 2. Sprint fears that AT&T will be able to leverage its future dominant position in the calling card market to stifle competition in the 900 transport market. *Id.* at 3. Sprint contends, therefore, that expanding 900 access from 1+ calling to 0+ calling may be an unreasonable practice under Section 201(b) of the Act, 47 U.S.C. § 201(b), and may work to discriminate in favor of AT&T and against other IXCs offering 900 transport in violation of Section 202(a), 47 U.S.C. § 202(a). *Id.* at 2-3. Thus, Sprint requests that the Commission suspend Transmittal 1544 and institute an investigation examining the demand for 0+ access to 900 service and AT&T's ability to use its future leverage in the calling card market to the detriment of 900 transport competition. *Id.*

4. PacBell replies that Sprint's petition should be rejected because the arguments pertain to credit card validation, and therefore are not germane to the instant access service tariff filing. PacBell Reply at 2. Moreover, PacBell argues, Sprint provided no evidence that offering end users 0+ access to its 900 services is an unreasonable practice in violation of Section 201(b). PacBell also argues that Transmittal 1544's 0+900 option is available to all carriers on a nondiscriminatory basis, and that Sprint provided no evidence of Section 202(a) discrimination. *Id.* at 2-3.

5. The Common Carrier Bureau has reviewed Pacific Bell Transmittal No. 1544, Sprint's petition, and PacBell's reply. We conclude that no compelling argument has been presented that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1544, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Since the introduction of 900 access service, 0+900 calls have been blocked in all PacBell switches because most interexchange carriers (IXCs) did not have 0+900 call rating capability in their operator service systems. PacBell has now upgraded its network in order to open 0+ access for 900 access service. Tr. 1544 Description and Justification (D&J) at Section 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

General Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 669

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1991; Released: October 4, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 7, 1991, General Telephone Operating Companies (GTE) filed Transmittal 669, to establish regional signalling transfer points (STPs) as customer designated locations to which GTE will provide transmission service pursuant to GTE's special access tariff. GTE contends that this is necessary to provide dedicated links from interexchange carrier (IXC) points of presence (POPs), and that these links are a prerequisite for other common channel signalling (CCS) related services, such as calling card validation offered through a line identification database (LIDB). GTE Transmittal No. 669, Description and Justification (D&J) at 5-6. GTE maintains that it will not impose an additional charge for the STP termination, and each termination will be dedicated to a single user. *Id.* at 6. GTE will require users to purchase either a 56 kilobit per second (kbps) special access service, or a DS1 special access service and a multiplexer service necessary to interconnect with a 56 kbps channel. *Id.* at 7-8.

2. Transmittal 669 is scheduled become effective on October 5, 1991, on 120 days' notice. MCI Telecommunications Corporation (MCI) and Independent Telecommunications Network, Inc. (ITN)[1] filed petitions to reject or suspend and investigate, and GTE filed a reply. For reasons discussed below, we reject Transmittal 669.

II. ISSUES

A. Summary of Pleadings

1. Billing and Collection

3. According to GTE, LIDB stores data on the status of GTE calling cards issued to end users. LIDB service enables IXCs to query the database to determine whether a calling card is valid before setting up the call. D&J at 5. Although this transmittal describes a transmission service that would be used for LIDB purposes, GTE believes that calling card validation is a detariffed billing and collection service. GTE states that it will provide the necessary cost support information if the Bureau finds that LIDB must be tariffed. *Id.*

4. MCI maintains that LIDB does not fit within the definition of unregulated billing and collection established in the *Billing and Collections Order.* [2] MCI asserts that calling card numbers are a surrogate for automatic number identification, and thus a part of call set-up. MCI Petition at 2. MCI also argues that LIDB should be tariffed because LIDB is not a competitive service. *Id.* at 3-4. GTE contends that its service to provide transmission to LIDB is severable from LIDB calling card validation itself. It also states that it would tariff transmission to LIDB as special access regardless of whether LIDB validation was billing and collection. Based on this, GTE as-

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[1] GTE states it has a mated pair of STPs in California and another mated pair in Illinois and Indiana. D&J at 7. GTE intends to require purchase of Special Access services to both STPs of a mated pair to acquire any CCS related service. *Id.* ITN contends that GTE is precluded from offering CCS interconnection on a centralized basis by the GTE Consent Decree, United States v. GTE Corp., 1985-1 Trade Cas. (CCH) 66,355 (D.D.C. December 21, 1984) (GTE Consent Decree), and the denial of US West's petition for waiver of the Modified Final Judgment (MFJ) to offer CCS interconnection on a centralized basis. ITN Petition at 3-6. ITN maintains that some CCS-related services, such as LIDB validation and 800 database service, are interexchange services for purposes of the GTE Concent Decree, and that centralized CCS interconnection could be harmful to competition in the interexchange market. *Id.* at 6-8.

GTE contends that its CCS interconnection service is similar to US West's Service Link arrangement, which GTE claims the MFJ Court approved. GTE concludes from this that Transmittal 669 would not violate the GTE Consent Decree. GTE Reply at 7-8. GTE claims that it will require IXCs to provide their own transmission to the LATAs in which GTE's STPs are located, while a petition for waiver to provide interLATA transport is pending before the Court. *Id.* at 9. GTE also contends that it is allowed to offer interLATA services under the GTE Consent Decree. *Id.* Finally, GTE argues that the Bureau must evaluate Transmittal 669 in light of the Communications Act rather than the GTE Consent Decree. *Id.* at 9-10.

On July 15, 1991, ITN filed a supplement to its petition. In it, ITN raises no arguments that it did not raise in its petition. Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, governs the procedures for filing associated with tariff revisions. It provides for petitions opposing a tariff revision, and for replies. Section 1.773 makes no provision for "supplements" to petitions to reject or suspend and investigate, and ITN did not request a waiver of Section 1.773. Therefore, we take no notice of ITN's "supplement."

The Commission has often found that arguments based on the MFJ are properly raised in front of the MFJ Court rather than here. "Compliance with MFJ criteria is not one of the standards that we shall require an access tariff to satisfy. Compliance or noncompliance is an issue to be resolved by the Court." BellSouth Telephone Companies, 5 FCC Rcd 7007 n. 3 (Com. Car. Bur. 1990). *See also* American Telephone and Telegraph Co. 94 FCC 2d 545,550 n. 9 (1983); Ohio Bell Telephone Co., 1 FCC Rcd 942,944 (1986). For the same reasons, we decline to consider arguments based on the GTE Consent Decree.

[2] MCI Petition at 2, *citing* Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150, 1152 n. 2 (1986) (*Billing and Collection Order*).

sumes the issue of whether LIDB validation is billing and collection is not relevant to tariffing transmission to the LIDB database. GTE Reply at 3-4.

2. Interconnection

5. MCI also alleges that GTE could provide transport to its CCS network over facilities it calls "F links," which use a protocol similar to X.25. MCI Petition at 5-6. MCI also requests that GTE provide access to GTE's CCS network through local STPs when those are in place. *Id.* at 7. GTE contends that interconnection through regional STPs is necessary to insure network security, and that GTE should not be required to design its network according to MCI's specifications. GTE Reply at 5-6.

3. Net Revenue Test

6. GTE asserts that the increase in special access demand would be *de minimis* so as not to affect its Actual Price Index (API) for its Special Access Basket. D&J at 10. In addition, GTE claims that, since it intends to use existing special access rates for its CCS dedicated links, this transmittal does not describe a new service subject to a net revenue test. *Id.* at 11. TN maintains that there are significant incremental costs associated with Transmittal 669, and requests that GTE perform a net revenue test. ITN Petition at 8-9. In reply, GTE repeats that Transmittal 669 employs existing special access rates. GTE Reply at 1-2.

4. Pacific Bell Order

7. MCI maintains that this transmittal would tariff an interconnection facility to GTE's CCS network rather than a service. According to MCI, the Bureau has found that filings of this nature violate Section 61.38(b) of the Commission's Rules, 47 C.F.R. § 61.38(b).[3] GTE argues that Transmittal 669 is not analogous to the filing rejected in the *Pacific Bell Order*. Rather, GTE asserts that its filing is a nonchargeable option to a special access service, comparable to BellSouth's provision of out of band signalling as a nonchargeable option to Feature Group D service.[4]

5. Vagueness

8. MCI complains that Transmittal 669 is vague because the transmittal does not define signalling point of interface (SPOI) and fails to discuss where interfaces will be and other details of interconnection. MCI Petition at 7-8. ITN asserts that GTE fails to discuss the "hubbing" service GTE intends to provide through its CCS interconnection facilities, or the potential customers to which this service will be marketed.[5] GTE believes it has adequately explained its interconnection, either in the tariff transmittal or by reference to Bellcore publications. GTE Reply at 6-7.

B. Discussion

9. In Transmittal 669, GTE attempts to establish 56 kbps special access service between any IXC's POP and one pair of GTE's STPs, which are essentially packet switches. Part 69 of the Commission's Rules provide explicit instructions for the establishment of access charges. The Commission rules specify that Special Access charges apply to certain types of facilities; for example, private lines that terminate in a private branch exchange (PBX) facility, or interstate wide area telephone service (WATS) lines, or telex.[6] Most access facilities that are used for switched interstate services are not classified as Special Access. [7] The link between an IXC SPOI and a LEC STP that is the subject of Transmittal 669 will be used to deliver, or facilitate the delivery of, switched services offered by IXCs. Therefore, GTE's transmittal is contrary to the Commission's Rules. Accordingly, we reject it. We agree with GTE, however, that the facilities will be used on a dedicated basis and therefore the charge for the service should be a flat-rated charge per customer. Therefore, the costs of GTE's CCS interconnection link are properly recovered as a new dedicated transport subelement in the Transport element. Those costs may be recovered on a flat, per line basis.

III. ORDERING CLAUSES

10. ACCORDINGLY, the petitions for rejection or suspension and investigation filed by MCI Telecommunications Corporation and Independent Telecommunications Network, Inc. on June 24, 1991, ARE GRANTED, to the extent provided herein.

11. IT IS FURTHER ORDERED that the Motion to Strike filed by GTE Service Corporation on July 19, 1991, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[3] MCI Petition at 4-5, *citing* Pacific Bell, Revisions to Tariff F.C.C. No. 128, 5 FCC Rcd 4060 (Com. Car. Bur. 1990) (*Pacific Bell Order*).

[4] GTE Reply at 4-5, *citing* BellSouth Telephone Companies, Revisions to Tariff F.C.C. No. 4, 5 FCC Rcd 7619 (Com. Car. Bur. 1990) (*BellSouth Order*).

[5] ITN Petition at 9-10, *citing* Karpinski, *GTE Links RHCs With LIDB Hub*, Telephony, May 6, 1991, at 17.

[6] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 314-15 (1983).

[7] *Id.* at 309.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-591

In the Matter of

Amendment of Section 73.202(b),	RM-5845
Table of Allotments,	RM-5935
FM Broadcast Stations.	RM-5992
(Scottsboro, Alabama; Trenton, Georgia; Signal Mountain, Tennessee)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: October 18, 1991; Released: October 30, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration and motion for stay filed by KEA Radio, Inc. ("KEA"), licensee of Station WKEA-FM, Channel 252A, Scottsboro, Alabama, challenging the *Report and Order* in this proceeding, 4 FCC Rcd 6473 (1989). Broadcast Company of America, Inc. ("BCA"), and Michael J. Benns ("Benns"), two applicants for Channel 251A at Signal Mountain, filed separate oppositions to the petition for reconsideration. For the reasons discussed below, we will dismiss KEA's petition for reconsideration as procedurally defective.[1]

BACKGROUND

2. The *Report and Order* granted the petition filed by SonCom, Inc. ("SonCom") and allotted Channel 251A at Signal Mountain, Tennessee, as a first local service. That action also denied KEA's petition proposing to substitute Channel 251C2 for Channel 252A at Scottsboro, Alabama, and modify its license accordingly, and dismissed the petition filed by RA-AD of Trenton, Inc. ("RAAD") requesting the allotment of Channel 251A at Trenton, Georgia, for failureo file a statement of continuing interest. [2]

THE PLEADINGS

3. In its petition for reconsideration, KEA asserts that the Commission erred in its grant of the allotment to Signal Mountain and should reconsider and delete that allotment. KEA gives two reasons in support. First, KEA contends that SonCom's petition for rule making and comments in support were verified improperly pursuant to Section 1.52 of the Commission's Rules and should not have been accepted by the Commission. [3] According to KEA, because the documents were signed only by SonCom's consultant, James Price, who is neither SonCom's attorney nor its principal, no authorized official of SonCom or attorney of record has signed and verified SonCom's pleadings or stated SonCom's address. Therefore, KEA argues, SonCom's petition for rule making and comments do not comply with Section 1.52 of the Rules and should have been dismissed without being considered by the Commission. Second, KEA argues that the Commission's preference of SonCom's proposal at Signal Mountain based on provision of first local service was erroneous because Signal Mountain is also served by noncommercial educational FM station WAWL-FM, licensed to Chattanooga State Technical Community College. Thus, according to KEA, the proposals should have been considered pursuant to the fourth FM allotment priority,[4] and on this basis, Station WKEA-FM's upgrade should have been preferred, because Scottsboro, Alabama, is a more populous and faster growing community than Signal Mountain, Tennessee.

4. BCA and Benns oppose the petition for reconsideration. BCA argues that KEA's petition should be denied on a procedural basis because it failed to raise the issue of verification on a timely basis, *i.e.*, during the comment and reply comment period, and KEA fails to justify its tardiness in raising this issue pursuant to Section 1.429(b) of the Rules. That section of the rules provides that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances: (1) the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest. On the merits, Benns argues that because the Commission has authority to allot a channel on its own motion, the existence of a defect in the petition does not

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[1] In view of this action, KEA's request for a stay in the opening of the filing window for Channel 251A at Signal Mountain will be dismissed as moot.

[2] After the *Report and Order* was adopted, KEA filed a Motion to Dismiss Petitions for Rule Making filed by SonCom and RA-AD. We need not address this motion, however, because the issue raised with respect to SonCom will be addressed herein, and the issue raised with respect to RA-AD is moot.

[3] Section 1.52 provides in pertinent part: "The original of all petitions, pleadings, briefs, and other documents filed by any party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign and verify the document and state his address."

[4] The Commission's FM allotment priorities are as follows:

(1) first full time aural service;

(2) second full time aural service;

(3) first local service;

(4) other public interest matters.

Co-equal weight is given to priorities (2) and (3). *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

invalidate the Commission's action making the channel assignment. BCA argues that lack of verification is not grounds for the immediate rejection of SonCom's proposal at Signal Mountain, and may be excused by the Commission or cured by the petitioner, citing for example, *Lake City, South Carolina*, 47 FCC 2d 1067, 1069 (1974); *Belo Broadcasting Corp.*, 39 RR 2d 899, 901 n.4 (1977); and *Canton, et al., Illinois*, 3 FCC Rcd 5824, 5825 (1988). BCA states that while the Commission made no request for a cure in this case, Craig Miller, president of SonCom, has filed verifications for each of SonCom's submissions, and acceptance of these late submissions is in the public interest, as it will allow for the provision of first service to Signal Mountain, Tennessee.[5]

5. BCA and Benns also argue that the Commission properly gave preference to Signal Mountain based on first service notwithstanding the existence of noncommercial educational station WAWL-FM, Signal Mountain, Tennessee. BCA notes that Scottsboro, Alabama, has three commercial stations, all of which are higher in power than WAWL-FM. Additionally, BCA points out that WAWL-FM is in the process of changing its community of license to Red Bank, Tennessee, and asserts that it is likely that the party who eventually operates on Channel 251A at Signal Mountain will indeed provide the only local service to the community. Benns asserts that our preference of Signal Mountain was correct because non-commercial educational stations do not qualify as local stations for purposes of our allotment priorities. According to Benns, this is because, unlike commercial FM stations, non-commercial educational FM stations are not assigned to communities by allotment, but rather, are situated at any location which complies with the contour protection requirements of Section 73.509 of the Rules.

DISCUSSION

6. After careful consideration of the pleadings filed in this proceeding, we will dismiss KEA's petition for reconsideration as procedurally defective because it relies on facts not presented to the Commission previously and fails to satisfy any of the three prongs of Section 1.429 of the Rules. *See Mt. Morris and Savanna, Illinois; Belle Plaine, et al., Iowa*, 5 FCC Rcd 2683 (1990); *Santa Margarita and Guadalupe, California*, 4 FCC Rcd 7887, 7889 (1989); *see also Whidbey Broadcasting Service, Inc.*, 4 FCC Rcd 8726 (1989); *Direct Broadcast Satellite Service*, 53 RR 2d 1637 at 1641-42 (1983). The facts in question were in the pleadings filed in this proceeding and served on KEA as a party, and were not raised in a timely manner during the last opportunity to present them in the comment and reply comment period. Furthermore, KEA offers no justification for its untimely presentation. We note that KEA does not argue that the SonCom petition for rule making or comments in support were sham or false pursuant to Section 1.52 of the Rules, or that they were filed in bad faith to abuse the Commission's processes. We further note that while we may not waive the verification requirement of the rules, *see Belo Broadcasting Corp.*, 39 RR 2d 899, 901 n.4 (1977), we may accept SonCom's late-filed cure pursuant to Section 1.52 of the Rules, and do so accept.[6] *See Canton, et al. Illinois*, 3 FCC Rcd 5824 (1988). We conclude, therefore, that KEA has failed to show that the facts on which it relies relate to events or circumstances which have changed since the last opportunity to present them to the Commission pursuant to Section 1.429(b)(1), or that these facts were unknown to it until after its last opportunity to present them, and that it could not, through the use of ordinary diligence, have learned of the facts in question prior to such opportunity, pursuant to Section 1.429(b)(2). Finally, KEA has not shown that consideration of these facts at this juncture would serve the public interest pursuant to Section 1.429(b)(3). We note, in fact, that the public interest will be served by the allotment to Signal Mountain, as it will provide a first local transmission service,[7] and because interest has been expressed in the allotment by the filing of over ten competing applications.

7. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by KEA Radio, Inc. IS DISMISSED.

8. IT IS FURTHER ORDERED, that the motion for stay filed by KEA Radio, Inc., IS DISMISSED.

9. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[5] These documents were filed after the filing of the petition for reconsideration in this matter.

[6] To the extent SonCom's pleadings failed to comply with Section 1.52 of our Rules, we admonish SonCom, but we note that SonCom is not among the applicants for the allotment at Signal Mountain, and will not be involved further in this proceeding.

[7] We also find that the *Report and Order* correctly determined that the allotment to Signal Mountain would provide a first local transmission service. Although the Commission now recognizes noncommercial-educational FM stations as local transmission services in its analysis under Section 307(b)of the Communications Act of 1934, as amended, *see Valley Broadcasters, Inc.*, 5 FCC Rcd 2785 at 2788 (1990), in cases such as this, which were decided prior to that decision, noncommercial-educational stations were not considered relevant. Therefore, Station WAWL-FM did not figure into the analysis, and the allotment to Signal Mountain correctly was preferred as a first local transmission service. In any event, even considering Station WAWL-FM as a local transmission service, and the new allotment at Signal Mountain as a second local transmission service, the Signal Mountain allotment would be preferred over the Station WKEA-FM upgrade under Commission FM allotment priority number four, because Commission policy prefers a new primary service over an upgrade of an existing service. *See Benton, et al., Arkansas; Homer, Louisiana; Sallisaw and Vinita, Oklahoma; Hooks and Kilgore, Texas*, 3 FCC Rcd 4840 (1988). We also note that Station WAWL-FM's licensee, Chattanooga State Technical Community College, filed an application (File No. BPED-890309JA) for a construction permit to change its community of license to Red Bank, Tennessee, which was granted on December 27, 1990. Thus, it is likely that the prevailing applicant at Signal Mountain will, indeed, provide the only local transmission service.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 89-521

In the Matter of

Amendment of Section 73.202(b),	RM-6963
Table of Allotments,	RM-7254
FM Broadcast Stations.	
(Lancaster, Wisconsin, Clinton and	
Manchester, Iowa, and Morrison,	
Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 18, 1991; Released: October 31, 1991

By the Assistant Chief, Allocations Branch:

1. In response to a petition filed by K to Z, Ltd. ("K to Z") the Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 8204 (1989), proposing the substitution of Channel 249C3 for Channel 249A, Lancaster, Wisconsin, and modification of its license for Station WAXL(FM) to specify the higher class channel. To accommodate Channel 249C3 at Lancaster, K to Z proposed the substitution of Channel 234A for Channel 249A, Clinton, Iowa, and Channel 271A for Channel 236A, Morrison, Illinois. K to Z filed comments reaffirming its support for Channel 249C3 at Lancaster. Morrison Broadcast Associates ("Morrison Broadcast") and David B. Knoll ("Knoll") filed comments. Susan I. Coloff ("Coloff") filed a petition for rule making which has been treated as a counterproposal.[2,3]

2. Coloff, permittee of Station KMCH, Channel 234A, Manchester, Iowa, proposed the substitution of Channel 234C3 for Channel 234A at Manchester. Coloff's request is short spaced to the proposed substitution of Channel 234A for Channel 249A at Clinton, Iowa.

3. Knoll is the proponent in a proceeding proposing the allotment of Channel 271A to the community of Oglesby, Illinois, as a first local service. Channel 271A at Oglesby is short spaced to the proposed substitution of Channel 271A for Channel 236A at Morrison, Illinois. Knoll does not oppose the upgrade at Lancaster or the substitutions at Morrison and Clinton provided a channel is allotted at Oglesby, Illinois.[4]

4. Morrison Broadcast, permittee of Station WZZT(FM), Morrison, Illinois, responded to the *Notice and Order to Show Cause*. Morrison Broadcast states that it does not oppose the substitution at Lancaster but does oppose the change of Station WZZT(FM) from Channel 236A to Channel 271A. Morrison Broadcast points out that Channel 271A at Morrison is incompatible with the use of Channel 271A at Oglesby, Illinois, in MM Docket 89-517. As an alternative, Morrison Broadcast suggests its channel be changed from Channel 236A to Channel 274A.[5]

5. A staff engineering analysis indicates that Channel 249C3 can be allotted to Lancaster, Wisconsin (population 4,076)[6] at petitioner's proposed site provided channel substitutions are made at Clinton, Iowa, and Morrison, Illinois, or Channel 234C3 can be substituted for channel 234A at Manchester, Iowa (population 4,942). However, both channel upgrades cannot be granted in compliance with the spacing requirements. Thus, we must choose between the conflicting proposals and base our decision on the following allotment criteria as set forth in *Revision of FM Policies and Procedures*, 90 FCC 2d 1988 (1982):

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

|co-equal weight given to priorities (2) and (3)|

Our engineering analysis indicates that neither upgraded station would provide first or second full-time aural service. Since both communities have existing FM stations, neither proposal will provide a first local service under priority three.[7] In view of the foregoing, we believe it is appropriate to base our determination on which modification proposal should prevail under priority four of the allotment criteria. This priority permits the Commission to compare the extended service areas provided by each proponent. We conducted our own engineering and popu-

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[1] The community of Manchester has been added to the caption.

[2] Public notice was given on February 6, 1990, Report No. 1807 (RM-7254) of Coloff's petition.

[3] Coloff also filed comments, a counterproposal and an erratum. This proposal, which requests the allotment of Channel 281C3 in lieu of Channel 288C3 to Mt. Pleasant, Iowa, was filed January 11, 1990, in this proceeding and in MM Docket 90-103. Her proposal was rejected in MM Docket 90-103 for noncompliance with the mileage separation requirements. *See Report and Order (Mt. Pleasant, Iowa)*, 5 FCC Rcd 6626 (1990), *recon. pending*. We reject her counterproposal in this proceeding for the same reason. Coloff's proposal was filed after October 2, 1989, and therefore it must comport with the mileage separation requirements adopted in MM Docket 88-375. *See* 4 FCC Rcd 6375 (1989), and Commission Rule 73.207.

Since the counterproposal filed by Coloff was not accepted, the reply comments filed by KILJ, Inc., licensee of Station KILJ, Channel 288A, Mt. Pleasant, Iowa, and Coloff will not be considered.

[4] Channel 271A was allotted to Oglesby, Illinois, in MM Docket 89-517. *See* 6 FCC Rcd 3293 (1991). The window for filing applications opened on July 22, 1991, and will close on August 21, 1991.

[5] Brisco Broadcasting, Inc. ("Brisco"), licensee of Station KCLN-FM, Channel 249A, Clinton, did not respond to the *Notice and Order to Show Cause*. Therefore, Brisco is deemed to have consented to the proposed modification.

[6] Population figures were taken from the 1980 U.S. Census.

[7] We note that Lancaster is served by FM Stations WAXL(FM),

lation analyses of the proposals to determine which could provide a new service to the largest population within the gain area of the predicted C3 service contours. *See Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987); *aff'd in relevant part*, 4 FCC Rcd 3843 (1989); *aff'd in relevant part*, 6 FCC Rcd 1493 (1991); *appeal dismissed sub nom. WATH, Inc. v. FCC*, D.C. Cir. No. 91-1268 (Sept. 26, 1991).

6. After considering the results of our analyses, we conclude that the Manchester proposal should be adopted. Both proposals could provide a new service to residents within their predicted gain areas and both proponents have indicated a need for a new service. However, as noted above, both communities cannot have the requested upgrade. We believe our decision, based on a comparison of the population within the predicted gain areas, will bring the benefits of a new service to a greater number of people. A comparison of the population totals indicates that adoption of the Manchester proposal would result in service to an additional 57,302 persons, while adoption of the Lancaster proposal would result in service to an additional 26,438 persons. Therefore, the petition filed by K to Z, Ltd. to substitute Channel 249C3 for Channel 249A at Lancaster, Wisconsin, to substitute Channel 271A for Channel 236A, Morrison, Illinois, and to substitute Channel 234A for Channel 249A, Clinton, Iowa, shall be denied. We will allot Channel 234C3 to Manchester, Iowa, and modify the construction permit for Station KMCH to specify operation on Channel 234C3.

7. Based on the above information, we believe the public interest will be served by the substitution of Channel 234C3 for Channel 234A, Manchester, Iowa, in order to provide that community with a wide area FM service. Channel 234C3 can be allotted to Manchester in compliance with the Commission's minimum distance separation requirements at petitioner's specified site. [8] We shall also modify the construction permit for Station KMCH to specify operation on Channel 234C3 in accordance with Section 1.420(g) of the Rules.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 16, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Manchester, Iowa	234C3

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KMCH, Manchester, Iowa, IS MODIFIED TO specify operation on Channel 234C3 in lieu of Channel 234A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the petition filed by K to Z, Ltd. (RM-6963) IS DENIED.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

James L. Zimmermann, President
K to Z, Ltd
130 West Elm Street
P. O. Box 587
Lancaster, Wisconsin 53813

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

WGLR, AM Station WGLR and noncommercial educational Station WJTY while Manchester is served by FM Station KMCH.

[8] The coordinates for Channel 234C3 at Manchester are 42-20-42 and 91-23-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-217

In the Matter of

Amendment of Section 73.202(b),	RM-7751
Table of Allotments,	
FM Broadcast Stations.	
(Brainerd, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 21, 1991; Released: October 31, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 4394 (1991), proposing the allotment of Channel 278A to Brainerd, Minnesota, as that community's third FM broadcast service. The *Notice* was issued in response to a petition filed by Greater Minnesota Broadcasting Corporation ("petitioner"). Late filed comments were submitted by petitioner.[1]

2. We believe the public interest would be served by allotting Channel 278A to Brainerd, in order to provide the community with a third FM broadcast service. As indiated in the *Notice*, Channel 278A can be allotted to Brainerd consistent with the Commission's spacing requirements without a site restriction.[2] Since Brainerd is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 16, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Brainerd, Minnesota	278A, 294C1, 298C1

4. The window period for filing applications for Channel 278A, Brainerd, Minnesota will open on **December 17, 1991,** and close on **January 16, 1992**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner's comments were received after the cut-off date established in this proceeding and were not accompanied by a motion to accept. However, because this proceeding is uncontested, we will accept the comments for the purpose of allowing petitioner to reaffirm its interest in applying for the channel.

[2] The coordinates for Channel 278A at Brainerd are 46-21-36 and 94-12-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-223

In the Matter of

Amendment of Section 73.202(b), RM-7758
Table of Allotments,
FM Broadcast Stations.
(Rozel, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 21, 1991; Released: November 1, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 4730 (1991), proposing the substitution of Channel 254C1 for Channel 254A at Rozel, Kansas, and modification of the construction permit (BPH-890217MP) for Station KGZE, Channel 254A, accordingly. The *Notice* was issued in response to a petition filed by Lee E. Scott ("petitioner"). Late filed comments were submitted by petitioner.[1]

2. We believe the public interest would be served by substituting Channel 254C1 for Channel 254A at Rozel, Kansas, in order to provide the community with a wide coverage area station. As indicated in the *Notice*, Channel 254C1 can be allotted to Rozel consistent with the Commission's spacing requirements at petitioner's specified site.[2] We will authorize a modification of petitioner's construction permit for Station KGZE, Channel 254A, Rozel, to specify operation on Channel 254C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 16, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Rozel, Kansas	254C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KGZE, Rozel, Kansas, IS MODIFIED to specify operation on Channel 254C1 in lieu of Channel 254A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Lee E. Scott, permittee of Station KGZE, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner's comments were received after the cut-off date established in this proceeding and were not accompanied by a motion to accept. However, because this proceeding is uncontested, we will accept the comments for the purpose of allowing petitioner to reaffirm his interest in applying for the channel.

[2] The coordinates for Channel 254C1 at Rozel are 38-20-00 and 99-40-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-310

In the Matter of

Amendment of Section 73.202(b), RM-7829
Table of Allotments,
FM Broadcast Stations.
(Fort Bragg, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 21, 1991; Released: October 31, 1991

Comment Date: December 23, 1991
Reply Comment Date: January 7, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by Axell Broadcasting ("petitioner"), licensee of Station KSAY(FM), Fort Bragg, California, seeking the substitution of Channel 253B1 for Channel 253A[1] and modification of its license to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 253B1, if allotted to Fort Bragg, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 253B1 for Channel 253A at Fort Bragg, California, since it could provide the community with an expanded coverage area FM service. Channel 253B1 can be allotted to Fort Bragg at the petitioner's presently authorized site in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[2] As requested, we also propose to modify the Class A license for Station KSAY(FM) to specify operation on Channel 253B1. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 253B1 at Fort Bragg.

3. Accordingly, in order to provide Fort Bragg with an expanded coverage area FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Fort Bragg, California	237A, 244B, 253A	237A, 244B, 253B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 23, 1991,** and reply comments on or before **January 7, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Axell Broadcasting
Attn: Wade Axell
P.O. Box 2269
Fort Bragg, CA 95437

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although petitioner is presently licensed on Channel 249A, it was ordered to relocate to Channel 253A to accommodate the modification of license for Station KMGG(FM), Monte Rio, California. *See* 6 FCC Rcd 4852 (1991).

[2] Coordinates for proposed Channel 253B1 at Fort Bragg are 39-28-03 and 123-45-34.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-311

In the Matter of

Amendment of Section 73.202(b), RM-7828
Table of Allotments,
FM Broadcast Stations.
(Felton, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 21, 1991; Released: October 31, 1991

Comment Date: December 23, 1991
Reply Comment Date: January 7, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed on behalf of W. Robert Morgan ("petitioner") requesting the allotment of Channel 229A to Felton, California, as its first local aural broadcast service. Petitioner stated his intention to apply for the channel, if it is ultimately allotted.

2. In support of his proposal, petitioner submits that although Felton contains a population of 5,350 persons, it currently lacks any local aural broadcast service. Petitioner asserts that Felton is of sufficient size and development to warrant receiving its own local broadcast service.

3. A staff review of the proposal reveals that Felton, located 5 miles northwest of Santa Cruz (pop. 41,483),[1] is listed as a Census Designated Place ("CDP") (census area only) by the Census Bureau. The 1980 U.S. Census lists Felton's population as 4,564. According to the 1991 Rand McNally *Commercial Atlas and Marketing Guide ("Atlas")*, Felton's population (4,000) is combined with that of Mt. Hermon (population 560), and Felton Grove (population not listed). Additionally, although Felton is attributed with its own zip code, the *Atlas* indicates that Mount Hermon is the postal facility for both areas.

4. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allocate channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Hannibal, OH*, 5 FCC Rcd 3315 (1990); and *Statenville, GA*, 5 FCC Rcd 2685 (1990). Although Felton is listed in the 1980 U.S. Census as a CDP, the Census listing is not conclusive for allotment purposes where the community may lack the traditional components necessary for ascertaining community status, such as a post office, library, schools, shopping center, churches, newspaper, and social or civic organizations. *See, e.g., Searles Valley, CA*, 3 FCC Rcd 5221 (1988); *see also Naples, FL*, 41 RR 2d 1549 (1977). Therefore, petitioner is requested to submit information regarding Felton to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with that locality.

5. Channel 229A can be allotted to Felton in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 11.7 kilometers (7.3 miles) northwest of the community[2] to avoid short-spacing to Station KHIP(FM), Channel 228A, Hollister, California.[3]

6. We believe the public interest would be served by proposing the allotment of Channel 229A to Felton, California, in the event it is ultimately found to qualify as a community for allotment purposes, since an interest has been expressed in providing a first local aural broadcast service at that location. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Felton, as follows:

	Channel No.	
City	Present	Proposed
Felton, California	--	229A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 23, 1991,** and reply comments on or before **January 7, 1992,** and are advised to read the Appendix for the proper procedures. Comments should also be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

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[1] According to the *Atlas*, Santa Cruz is attributed with an estimated population of 48,900, of which 8,000 are college students.

[2] Coordinates used for proposed Channel 229A at Felton are 37-06-17 and 122-11-10.

[3] Coordinates at the licensed site of Station KHIP(FM) are 36-45-23 and 121-30-05.

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9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

JOSEPH F. BRYANT
(Transferor)

and File No. BTCCT-900508KH

JAMES W. OWENS and
LORIANNE CROOK-OWENS
(Transferees)

For Transfer of Control of Bryant
Communications, Inc., Licensee of
Station WJFB(TV), Lebanon, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 1991; Released: October 31, 1991

By the Chief, Video Services Division:

1. This order concerns the application (BTCCT-900508KH) for transfer of control of Bryant Communications, Inc. (Bryant Communications), licensee of Station WJFB(TV), Channel 66, Lebanon, Tennessee, from Dr. Joseph F. Bryant (Bryant) to James W. Owens and Lorianne Crook-Owens (transferees). Petitions to deny the application have been filed by TETCO, Inc. (Tetco) and Act III Broadcasting of Nashville, Inc. (Act III).[1]

2. Section 309(d)(1) of the Communications Act provides, in part, that a petition to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest. The petition also must be either supported by affidavits of persons having personal knowledge of the matters alleged, or, alternatively, refer to facts we can officially notice. If a *prima facie* case is made, then on the basis of the response, we must determine whether there is a substantial and material question of fact that warrants further inquiry. *Astroline Communications Co. v. F.C.C.*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). As a procedural matter, neither petition can be accepted as a petition to deny since neither is supported by an affidavit of a person with personal knowledge of the matters alleged, nor, insofar as the disposition of the issues is concerned, do they rely on matters which we can officially notice. Therefore, the petitions will be dismissed. We will, however, in our discretion, consider the petitions as informal objections pursuant to Section 73.3587 of the Commission's Rules. In that regard, we note that informal objectors must still set forth sufficient facts to justify the relief sought.

TETCO PETITION

3. Tetco claims that transferees lack the requisite financial qualifications to become a Commission licensee because they are unable to meet their current financial obligations. According to Tetco, on October 1, 1984, Jim Owens Television, Inc. (Owens Television) agreed to produce television programs for a Tetco subsidiary, JRD Productions, Inc. (JRD). At that time, James W. Owens was President and controlling principal of Owens Television. Subsequently, Owens Television and JRD agreed to release each other from further obligations, except that Owens Television agreed to pay JRD $112,884 and to produce certain television shows. Tetco contends that Owens Television has wholly failed to meet its obligations and that Tetco expects to seek judicial relief for indebtedness exceeding $600,000. Tetco submits that in view of these circumstances, it doubts the reliability of transferees' certification that "sufficient net liquid assets are on hand or are available from committed sources to consummate the transaction and operate the facilities for three months." Furthermore, petitioner asserts that transferees' failure to disclose the JRD indebtedness in connection with their financial certification reflects on transferees' veracity and demonstrates a lack of candor.

4. In opposition, transferees deny that Owens Television is indebted to JRD or that James W. Owens is personally liable for the alleged debt. In support, they submit an affidavit of James H. Harris III, (the attorney who handled the JRD matter for Jim Owens) who declares that Jim Owens does not have, and never has had, any personal obligation to JRD or Tetco.

5. *Discussion.* Tetco has not shown that the finances of Owens Television - a separate company - is germane to the finances of Mr. and Mrs. Owens. Furthermore, the Commission does not require an applicant to disclose the existence of a disputed claim - even if the claim were a personal liability of the applicant. Here, the transferees have submitted the required certification as to their financial qualifications and nothing proffered by Tetco raises a *prima facie* question as to the reliability of that statement. Lastly, to the extent that Tetco is seeking the Commission's assistance in resolving its financial dispute with Owens Television, the Commission has consistently held that it is not the proper forum to resolve private contractual disputes and that any redress should be sought in a local court. *John L. Runner, Receiver (KBIF)*, 36 RR 2d 773, 778 (1976) and *Transcontinental Television Corp. (WROC-TV)*, 21 RR 945, 956 (1961). Accordingly, when considered on the merits, we find that Tetco's objection must be denied.

[1] The pleadings before us are: a) Petition to Deny, filed June 28, 1990, by Tetco, Inc. (Erratum, filed July 3, 1990 and Declaration, filed July 6, 1990); b) Owens' Opposition to Petition to Deny, filed July 11, 1990; c) Tetco, Inc.'s Reply to Opposition to Petition to Deny, filed July 23, 1990; d) Petition to Deny, filed June 27, 1990, by Act III; e) Owens' Opposition to Petition to Deny, filed July 11, 1990; f) Act III's Reply to Opposition to Petition to Deny, filed July 18, 1990; g) Act III's Supplement to Petition to Deny, filed December, 13, 1990; h) Owens' and Bryant's Reply to Supplement to Petition to Deny, filed December 27, 1990; and i) Act III's Reply to Opposition to Petition to Deny, filed January 10, 1991. In order to have a complete record, and in our discretion, we will consider all the supplemental pleadings.

ACT III PETITION

6. *Low Power Television Applications.* Section 73.3564(d) of the Rules states that no individual can submit more than five low power television applications during any filing window. Act III contends that the transferees lack basic qualifications to control WJFB(TV) because Mr. and Mrs. Owens exceeded the five-station limit. Relying on *Alexander S. Klein*, 86 FCC 2d 423 (1981), Act III contends that the Commission presumes that the media interests of one spouse are attributable to the other spouse. Act III concludes that when Mr. Owens and Mrs. Owens each filed three applications during the December 1989 filing window for new low power stations, they violated the rule. Act III also argues that even if the usual presumption of spousal attribution does not apply to low power television situations, it should be applied to Mr. and Mrs. Owens because their joint application to purchase Station WJFB(TV) makes it clear that their communications activities are interrelated.

7. In opposition, transferees admit that they each filed three low power television applications as sole proprietors during the December 1989 filing window. However, they contend that they were informed by counsel and the Commission's staff prior to filing the applications that the filing of their applications was consistent with the five-application-per-applicant limitation. Further, transferees note that the Commission has ruled that *Alexander S. Klein* does not apply to low power television applications. Moreover, transferees contend that applying for the six low power television stations fails to demonstrate that they are of unfit character to be a Commission licensee.

8. *Discussion.* The Commission has stated that in computing the lottery diversity preference for low power television applicants, spousal ownership interests will be treated in the same manner as other family relationships. *See Random Selection Lotteries*, 93 FCC 2d 952, 977, n. 36 (1983). That is, a spousal relationship, standing alone, will not be presumed to create common control over a mass media entity in which one spouse has an interest. *Id.* There is no basis for treating spousal attribution differently in the context of filing window limitations. Act III has presented no persuasive information to overcome the presumption that Mr. and Mrs. Owens were operating independently when their respective low power television applications were filed. Act III would have us infer joint operation solely on the basis of the filing of this assignment application some five months after the low power television window opened in December of 1989. Clearly, such a conclusion is not supported by any facts. Thus, we find that Act III has not made a *prima facie* case that Mr. and Mrs. Owens violated the rule or exceeded the maximum limit at the time each filed three low power applications in their separate names.

9. *Premature Transfer of Control.* Act III contends that there has been a premature transfer of control of Station WJFB(TV) in violation of Section 310(d) of the Communications Act. It contends that since the time that the agreement of sale was reached, Station WJFB(TV) changed its format, changed the location of its studio and increased its operating power, all in accordance with the transferees' publicly announced plans. With regard to the format change, Act III asserts that on December 4, 1990, the station had a "premiere" broadcast, co-hosted by Lorianne Crook-Owens, in which the station's new programming was introduced to the Nashville area. Invitations to attend the premiere were sent out jointly by Bryant Communications and an entity controlled by James A. Owens. It contends that Station WJFB(TV) now airs fourteen hours per day of programming produced by James W. Owens, and virtually all of the station's programming is produced at Owens' McGavock Street production facility. It also notes that the sign-on and sign-off announcements state that Station WJFB(TV)'s "studios" are located at the McGavock Street production facility. Act III also notes that the station's power was increased to 2500 kW on December 4th and contends that the equipment used for the power increase belongs to transferees and not Bryant. [2]

10. In opposition, the applicants admit that the programming changes were made. However, the changes are the result of a time brokerage arrangement between an Owens' controlled company and Bryant. James W. Owens is the owner of Jim Owens & Associates, Inc. (Owens Associates), a large program production company that produces programming for broadcast syndication and for cable networks. The applicants explain that Bryant wanted to put live local programming on WJFB(TV) and that Owens had a large investment in production resources sitting idle pending action on the stock transfer by the Commission, as well as the need to locate a local distributor for the upcoming Vanderbilt University basketball games, which are under contract to Owens Associates. Therefore, Owens Associates agreed to commence production and provide programming for WJFB(TV). The parties aver that the arrangement was attractive to Bryant, because he was guaranteed a stable source of revenue with which to operate the station and he gained access to programming of much higher quality and local interest than the station formerly broadcast. They also assert that the arrangement was attractive to Owens because it gave him the means to provide programming to the Lebanon/Nashville area and it allowed him to utilize his programming resources that would otherwise remain idle until the Commission approved the transaction.

11. Thus, the applicants entered into a time brokerage agreement whereby Owens Associates leased access to 15 1/2 hours of air time per day on Station WJFB(TV) and Bryant received a set sum per month for the daily air time. [3] The agreement was dated December 3, 1990 and was modeled after the agreement in *Roy R. Russo*, 5 FCC Rcd 7586 (M. Med. Bur. 1990), where the Commission recently had approved an extensive time brokerage agreement between two licensees, one of whom had an option to buy the other's station. The applicants contend that

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[2] Act III also points out that Station WJFB(TV), Channel 66, has a new logo which incorporates the phrase "Super 66" and that phrase is "reminiscent" of James W. Owens' stated intention of transforming WJFB(TV) into a superstation. Without more from Act III, we find the connection between "Super 66" and a superstation too tenuous to warrant further inquiry.

[3] Owens Associates leased the following blocks of time:

6:00 a.m. - 3:00 p.m.
4:00 p.m. - 6:00 p.m.
7:00 p.m. - 9:00 p.m.
10:30 p.m. - 1:00 a.m.

their time brokerage agreement is an arms-length transaction and that Bryant is in full control of the station's programming. Under the agreement, Owens Associates' broadcasts must be in conformity with the station's broadcast policies. All programs must be submitted for review to Bryant 24 hours in advance of their broadcast. Bryant reserved the right to refuse to broadcast any programs that do not, in Bryant's "sole opinion," meet his standards. In addition, Bryant has the right to preempt programming for any programs he deems to be of greater national, regional or local interest and the right to "take any other actions necessary for the compliance with the laws of the United States, the State of Tennessee, and the rules, regulations, and policies of the Federal Communications Commission." Furthermore, the time brokerage agreement provides that Bryant shall provide and is responsible for the station personnel necessary to broadcast Owens Associates' programming and that all Owens Associates' personnel shall be subject to the supervision of Bryant's station manager and chief engineer while on the station's premises. Bryant further states that he and his son, Frank Bryant, who is the station manager, both monitor Station WJFB(TV) programming throughout the day and have made programming changes. In support, the applicants submitted five memos between Bryant and Owens regarding station programming. [4]

12. The applicants also dispute Act III's allegation that Station WJFB(TV)'s move to Owens Associates' production facility is further evidence of premature transfer of control. They state that the move to the McGavock Street complex came about because Bryant is receiving payments under the time brokerage agreement and can now afford to lease improved studio facilities. The complex became an ideal choice because of its technical capabilities and because it allowed WJFB(TV)'s station manager to watch over the production of the programming. Furthermore, the applicants note that Bryant filed the power increase application on March 8, 1990, more than a month and a half before the stock transfer agreement was signed. Moreover, they maintain that the broadcast equipment is being used by Bryant as the result of an arms-length lease. They state that while the transfer application was pending, Owens was able to obtain some broadcast equipment, which he intended to use after the transfer was approved. Pending approval of the transfer application, he agreed to lease this equipment to Bryant Communications making the station more valuable for both transferees and Bryant.

13. *Discussion*. Generally, the Commission considers control over station finances, personnel matters and programming in determining whether there has been a premature or unauthorized transfer of control in contravention of Section 310 (d) of the Communications Act. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713,715 (1981). The Commission will also look behind the terminology of the parties' agreements to determine whether the prospective purchaser has assumed premature control of these aspects of the station's operation. *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981). In *Phoenix Broadcasting*, 44 FCC 2d 838 (1973), the Commission cautioned prospective purchasers to refrain from taking any actions, such as assuming general managerial functions, or lending funds, that could result in the premature exercise or assumption of control of the station involved. In *Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108, 111 (1975), while the Commission did not find an unauthorized transfer of control, it warned prospective purchasers not to assume managerial positions at the stations they seek to buy except under the most compelling circumstances.

14. The time brokerage agreement between Owens Associates and Bryant complies with the Commission's time brokerage policy. In *Roy Russo, supra.*, we permitted stations with overlapping contours, to broker time on each others' stations, because there was no indication that the brokering station had or would obtain an undue amount of control over the brokered station or that, conversely, the brokered station had or would abdicate ultimate control in the areas of finances, personnel matters, and programming. Here, Bryant's finances are separate from Owens Associates, Bryant's station manager and chief engineer maintain control of station operations, and Bryant receives all programming in advance and can preempt, suspend or cancel any programming. The record demonstrates that Bryant does in fact review the programming. Moreover, it is undisputed that Bryant continues to produce or purchase programs for the periods not brokered to Owens Associates. See footnote 3, above.

15. Subsequent to *Russo*, and the date of the execution of the time brokerage agreement before us here, we had the opportunity to review other time brokerage agreements. *See, Joseph A. Belisle*, 5 FCC Rcd 7586 (M. Med. Bur. 1990), *J. Dominic Monahan*, 6 FCC Rcd 1867 (M. Med. Bur. 1990), *Peter D O'Connell*, 6 FCC Rcd 1869 (M. Med. Bur. 1990), and *Brian M. Madden*, 6 FCC Rcd 1871 (M. Med. Bur. 1990). Those rulings refine the *Russo* decision. We remind the parties here that Bryant Communications is responsible to air their own station identifications, to maintain its own main studio within the principal community contour, to maintain its own public inspection file, andto cover local community issues, as reflected in the public inspection file's issues/programs lists. Furthermore, the licensee must continue to comply with the political programming laws. The licensee must oversee, and take ultimate responsibility for, the broker's advertising and programming practices with respect to the provision of equal opportunities, lowest unit charge and reasonable access to political candidates (47 U.S.C. §§ 315 and 312(a)(7)), and compliance with the political rules embodied in Sections 73.1920, 73.1930, and 73.1940 of the Commission's Rules. [5] *See Part-Time Programming*, 82 FCC 2d 107 (1980).

16. With respect to the power change, we note that Bryant filed its power change request prior to the time that the agreement with the transferees was signed. The power change application (BPCT-900308KG) was filed

[4] These documents are: (1) a memo dated November 12, 1990 approving a videotape with the exception of the "Rock'n" show which Bryant found "stiff and uneasy;" (2) a memo dated November 14, 1990 from Jim Owens to Bryant in response to the November 12th memo; (3) a November 27, 1990 memo to Owens from Bryant which replaced the "Rock'n" show with the "Rant and Rave" show; (4) a December 7, 1990 memo from Bryant to Owens which discusses the language used on the "Teddy Bart Show;" and (5) a December 10, 1990 response by Owens to Bryant's December 7th memo.

[5] The parties have not alleged that Bryant does not meet these requirements.

March 8, 1990 and the transfer of control agreement was signed April 26, 1990. Act III does not allege that this effectively transferred control of Station WJFB(TV) in March, 1990. In fact, Section 73.3517(a) of the Rules specifically contemplates that modification applications can be filed by a transferor for the benefit of a transferee. The fact that a transferor does so, does not establish by itself that the transferee has acquired control of the station. Thus, we find that Act III has not raised a substantial and material question of fact that transferees prematurely acquired control of Station WJFB(TV).

17. *Right of Reversion.* Act III contends that Bryant has retained a prohibited reversionary interest in the license of Station WJFB(TV) and, if transferees default, Bryant can resume his ownership and control of the licensee's stock and the station. Act III argues that the parties' agreements provide that Bryant will have a security interest in 100% of the stock of Bryant Communications; require transferees to deliver an irrevocable power of attorney for the stock in the name of a designee to be specified by Bryant; and entitle Bryant to take control of the stock if transferees default on the purchase price. Specifically, Act III states that, under Section 9 of the Security Agreement, Bryant is authorized to "exercise any and all of the rights and remedies of a secured party under the Uniform Commercial Code," including the right to "utilize... any... portion of this collateral." Furthermore, under Section 5.54 of the sales contract, Mr. and Mrs. Owens are required to execute an irrevocable power of attorney, for all the licensee's stock, in the name of Bryant's designee. As additional evidence of the right of reversion, Act III notes that Bryant will remain on the\ licensee's Board of Directors following the sale of his stock and will retain control of the station's transmitter site, which he has agreed to make available to transferees at $1 per year.

18. In response, transferees argue that there is no reversionary interest in view of the provisions of Section 4 of the Security Agreement. This section provides that the voting rights of the pledged stock remain with transferees, even upon the occurrence of an event of default, until the Commission gives its consent either to the exercise of voting rights by the new purchasers or to the exercise of voting rights by a receiver, trustee, conservator or other agent appointed pursuant to Tennessee law. In that regard, the agreement provides that Bryant will not take any action which would constitute or result in a change of control of the corporation requiring prior approval of the Commission, without first obtaining such prior approval. Transferees also claim that Act III mischaracterizes Section 5.54 of the sales contract. This section requires the irrevocable power of attorney to comply with Commission rules and procedure. It provides that transferees will deliver upon closing an Irrevocable Power of Attorney for the stock certificate "which Power of Attorney shall in form and substance comply with the rules and regulations of the Federal Communications Commission."

19. *Discussion.* A broadcast license does not confer a property right. Rather, it is a valuable, though limited, privilege to utilize the airwaves. Since a broadcast license is not subject to ownership, it is not subject to a reversionary interest, mortgage, lien, pledge, or any form of security interest. *Radio KDAN, Inc.*, 11 FCC 2d 934, *recon. denied*, 13 RR 2d 100 (1968), *aff'd sub nom. W. H. Hansen v. FCC*, 413 F.2d 374 (D.C. Cir. 1969). Section 73.1150 of the Commission's Rules specifically prohibits any rights to reassignment of the license to the seller in the future. Therefore, any automatic reversionary interest in a license is prohibited. Thus, the Commission only recognizes and approves contractual arrangements where fifty percent or more of the stock of a corporate licensee is pledged, where: (1) the licensee-borrower retains the voting rights in the stock and thus control of the station, and (2) in the event of default, the pledged stock is disposed of in a manner which would not limit the sale to the creditor.

20. Here, it is clear that subsequent to the transfer of control, transferees will retain the voting rights in the Bryant Communications stock. Section 4 of the Security Agreement specifically provides that transferees retain the voting rights, *even upon the occurrence of an event of default*, until the Commission approves the exercise of voting rights by someone else. With respect to disposal of the pledged stock, in the event of default, the parties have included language in the Security Agreement which clarifies that Bryant will not take any action which would constitute or result in a change of control requiring Commission approval, *without first obtaining such prior approval of the Federal Communications Commission.* We construe this language to recognize Commission requirements that any sale of the licensee's stock will be by public sale or in a manner, such as a private sale, which does not limit transferees' right to dispose of the stock. We, therefore, believe that this provision of the Security Agreement does not compromise transferees' rights of alienation over the Bryant Communications stock. However, we find the irrevocable power of attorney contained in the Sales Contract to be in conflict with the above provisions and not acceptable because it apparently removes the transferees' right to choose their successors and could limit reassignment to the transferor. Moreover, the holder of the power of attorney could not comply with the certifications that must be made in an assignment or transfer application by the seller. Therefore, we will approve this transaction subject to the condition that the parties remove the Power of Attorney provision and submit proof that it has been deleted prior to closing this transaction.

21. Lastly, we find that Section 73.1150 is not violated by either Bryant serving as a director of the licensee subsequent to the transfer of control or leasing the transmitter site to the licensee. Often lenders sit on licensees' Board of Directors. So long as there are no prohibited attritutable interests, this practice is permitted. *See* Section 73.3555 of the Rules and *Reexamination of the Commission's Cross-Interest Policy*, 4 FCC Rcd 2208 (1989). Moreover, just because Bryant is retaining the transmitter site does not support a case for reversionary interest; rather it is merely a manifestation of the parties' reasonable and legitimate business interests. Accordingly, Act III has failed to demonstrate that the agreements between Bryant and transferees result in a prohibited reversionary interest.[6]

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[6] Act III also alleged that transferees would violate the Commission's main studio rule, Section 73.1125 of the Commission's Rules, because they proposed to move Station WJFB(TV)'s main studio to Nashville which is outside the station's principal city

22. In view of the foregoing, we find that petitioners have either failed to raise a *prima facie* case or demonstrate the existence of a substantial and material question of fact requiring further inquiry. We also find that the applicants are fully qualified and that a grant of this application would be consistent with the public interest.

23. Accordingly, IT IS ORDERED, That the petitions to deny filed by TETCO, Inc. and Act III Broadcasting of Nashville, Inc. ARE DISMISSED and when considered as informal objections, ARE DENIED and that the application (BTCCT-900508KH) filed for transfer of control of Bryant Communications, Inc., licensee of Station WJFB(TV), Lebanon, Tennessee, from Joseph F. Bryant to James W. Owens and Lorianne Crook-Owens IS GRANTED, subject to the condition that Bryant and the transferees remove the provision requiring the execution of a Power of Attorney and provide proof to the Chief, Video Services Division, Mass Media Bureau, prior to closing the transaction.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

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contour. We note that on September 27, 1990, the Commission granted a modification application (BPCT-900308KG) which changed the station's contour. Thus, the studio relocation is now permitted under the rule.

Before the
Federal Communications Commission
Washington DC 20554

CC Docket No. 91-213

In the Matter of

Transport Rate Structure and
Pricing

ORDER

Adopted: October 24, 1991; Released: October 25, 1991

Comment Date: November 22, 1991
Reply Comment Date: December 23, 1991

By the Chief, Common Carrier Bureau:

1. On October 9, 1991, US Sprint (Sprint) filed a Motion for Amendment of Procedural Schedule requesting, among other things, that the date for filing comments in this proceeding be postponed until thirty days after the Bell Operating Companies (BOCs) and GTE complete and file with the Commission analyses of the effects of various transport pricing options. In this Order, we grant Sprint's motion in part.

2. In the Order and Further Notice of Proposed Rulemaking (Transport Order and Further Notice) instituting this proceeding, the Commission proposed to adopt a new rate structure for local exchange carrier (LEC) switched transport, consisting of a flat-rate dedicated transport charge, a usage-based common transport charge, and a usage-based interconnection charge. [1] In the Transport Order and Further Notice, the Commission asked the BOCs and GTE to prepare analyses of the effects of various pricing scenarios. The Commission directed the BOCs and GTE to work together and with the Common Carrier Bureau in selecting the pricing alternatives to be examined and in developing the methodologies for the preparation of these estimates.[2] The Commission established October 29, 1991, and November 28, 1991, as the respective dates for filing comments and replies. [3]

3. In its motion, Sprint states its understanding that several local exchange carriers (LECs) will apparently be unable to complete their pricing analyses until the initial comments are due, and that other LECs may not complete their analyses prior to the reply comment date.[4] Sprint states that if all of the BOCs and GTE do not complete and file their pricing analyses prior to the time for filing comments, the interexchange industry will be unable to address, with any specificity, the merits of the proposed three-element transport rate structure and the various rate level options. [5] Accordingly, Sprint asks that the Commission establish a deadline for filing of the BOC/GTE analyses, direct these carriers to make the analyses and complete descriptions of the underlying methodology public, and set the date for filing comments 30 days after the analyses are filed. [6]

4. MCI filed comments in support of Sprint's motion. MCI states that absent pricing analyses, neither the Commission nor interested parties will have an opportunity to analyze the effect of changes in transport pricing. MCI asserts that postponing the filing date for comments until after the BOCs and GTE have submitted these analyses would aid the Commission's effort to identify the "ultimate issues bearing upon the optimal transport rate structure...." [7]

5. NYNEX filed, stating that it does not oppose Sprint's request. NYNEX states that certain transport rate structure proposals could cause significant shifts in access costs among interexchange carriers (IXCs) and that it will be difficult for parties to conduct a thorough analysis of the data, explore any variations in results among the carriers, and reach definitive positions on the issues, unless the information is made available to the parties before the date for filing replies.[8]

6. Southwestern Bell (Southwestern) also states that it does not oppose certain aspects of the Sprint request. Southwestern, however, states that this position is conditional on retention of the current status quo concerning expanded interconnection since Commission action in that area, even if limited to the provision of special access, would necessitate changes in switched access rates.[9] Southwestern states that it can not support Sprint's request that a complete description of the underlying methodology for these calculations be made public on the ground that this could require disclosure of proprietary information on IXC usage patterns.[10]

7. Pacific Bell opposes Sprint's motion, and states its intention to file pricing estimates and analyses of their effect on the various classes of IXCs at the time comments are due.[11] Pacific also states that grant of the Motion would delay Commission action on fundamental issues

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[1] Transport Rate Structure and Pricing, Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 78-72 and 91-213, 6 FCC Rcd 5341, at para. 14 (1991).
[2] *Id.* at n. 68.
[3] *Id.* at para. 40.
[4] Motion for Amendment of Procedural Schedule, filed October 9, 1991, at 1 (Sprint Motion).
[5] Sprint Motion at 3-4.
[6] Sprint Motion at 4.
[7] MCI Comments in Support of US Sprint's Motion for Amendment of Procedural Schedule, filed October 16, 1991, at 1-2.
[8] NYNEX Reply to Motion for Amendment of Procedural Schedule, filed October 16, 1991, at 2.
[9] Southwestern Bell Response to US Sprint's Motion for Amendment of Procedural Schedule, filed October 21, 1991, at 1-2.
[10] *Id.* at 2.
[11] Pacific Bell Opposition to Motion for Amendment of Procedural Schedule, filed October 18, 1991, at 1.

that are important to the entire telecommunications industry, and contends that even a thirty-day delay could have a significant financial impact.[12]

8. We believe that an extension of time in which to file comments in this proceeding is appropriate. It appears that certain carriers will not be able to complete their pricing analyses until the reply comment round. Given our concern with ensuring full and fair interexchange competition, [13] we believe that IXCs and others must have a reasonable opportunity to evaluate the LEC pricing analyses. We are not persuaded, however, that the comment and reply cycle should be delayed as substantially as Sprint urges. In particular, we believe requiring that the BOCs file their pricing and impact analyses no later than the filing date for initial comments will allow a sufficient opportunity for analysis by the IXCs.

9. We understand that all seven BOCs and GTE plan to file their pricing analyses by late November. We are therefore extending the comment date to November 22, 1991, and directing the BOCs and GTE to file their pricing analyses by this date. [14] We believe that timely submission of the analyses is critical to resolution of the issues in this proceeding, and therefore encourage those carriers able to file their analyses earlier to do so and to make these analyses available to interested parties. Reply comments are to be filed on December 23, 1991, at which time, the IXCs will have an opportunity to respond to the pricing analyses filed in the comments.[15]

10. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the motion of US Sprint to amend the pleading cycle IS GRANTED to the extent described herein, and is otherwise DENIED.

11. IT IS FURTHER ORDERED that the BOCs and GTE are to file their pricing analyses no later than November 22, 1991.

12. IT IS FURTHER ORDERED, that comments are to be filed on November 22, 1991, and that reply comments are to be filed on December 23, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[12] *Id.* at 3.

[13] Transport Order and Further Notice at para. 8.

[14] At a minimum, each of the BOCs and GTE is to file pricing analyses of the following pricing scenarios: (1) common transport rates equal to dedicated transport per minute costs and dedicated transport rates equal to average special access rates for Voice Grade, DS1, and DS3, under a mileage sensitive rate structure; (2) the same as scenario (1) without mileage sensitive rates; (3) common and dedicated transport rates calculated pursuant to existing Part 69 rules; (4) common transport rates equal to average dedicated transport per-minute costs, dedicated transport rates equal to special access rates for Voice Grade and DS1, under a mileage sensitive rate structure; and (5) the same as option (4) without mileage sensitive rates. Under each scenario, the interconnection charge will be a residual. Separate estimates shall be prepared for each scenario to reflect existing IXC network configurations and projected reconfigurations. The BOCs and GTE are also to prepare separate impact estimates for large, medium, and small IXCs. Each BOC and GTE is also directed to file a complete explanation of their methodology consistent with the need to avoid disclosure of commercially sensitive information for IXCs. While this Order specifically mentions the analyses of the pricing scenarios outlined above, we expect to continue to work with the BOCs and GTE on other possible pricing alternatives and methodologies.

[15] We expressly reject Southwestern's apparent suggestion that the Commission not make any decisions in the *Expanded Interconnection* proceeding until the Commission resolves the issues posed here.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-308

In re Applications of

Linda U. Kulisky (hereafter "Kulisky")	File No. BPH-901024MD
Lynda F. Haskins (hereafter "Haskins")	File No. BPH-901025ME
Gilford Broadcasting Company (hereafter "Gilford")	File No. BPH-901025MF
David A. Gardner (hereafter "Gardner")	File No. BPH-901023MH (Dismissed Herein)
Tavernier Radio, Incorporated (hereafter "TRI")	File No. BPH-901026MF (Dismissed Herein)

For Construction Permit for
a New FM Station on Channel 245A (96.9 MHz)
in Tavernier, Florida

HEARING DESIGNATION ORDER

Adopted: October 17, 1991; Released: October 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Gardner, TRI.* Gardner and TRI have not paid their hearing fees by July 15, 1991, the date set forth in *Public Notice*, Mimeo No. 13110, released May 15, 1991. Their applications will, therefore, be dismissed. *See* revised Section 73.3573(f)(2) of the Commission's Rules. *Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 157-8, 170 (1990), *recon. granted in part*, FCC 91-154, released May 15, 1991.

3. *Gilford, Kulisky.* Gilford proposes to locate its transmitting antenna on the existing tower of WKLG(FM) located in Rock Harbor, Florida. Kulisky proposes to locate her transmitting antenna on the existing tower of WFKZ(FM), located in Tavernier, Florida. Our engineering study indicates that Gilford and Kulisky failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that both applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the applications are determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicants must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Gilford and Kulisky failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, both will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Gilford and Kulisky will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

4. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Gilford and Kulisky in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environ-

ment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, the applications of Gardner and TRI are HEREBY DISMISSED.

8. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Gilford and Kulisky shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

In-Flight Phone L.P.,
Complainant,

v. File No. E-90-411

GTE Airfone Incorporated,
Defendant.

ORDER

Adopted: October 21, 1991; Released: October 29, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1990, In-Flight Phone L.P. filed the above-captioned formal complaint against GTE Airfone Incorporated (hereinafter "GTE") alleging that GTE violated its experimental radio license for air-to-ground service by offering a Business Calling Card Program to airline passengers. On October 2, 1991, however, In-Flight Phone Corp. (the successor in interest to In-Flight Phone, L.P.) (hereinafter "In-Flight") filed a motion to voluntarily dismiss the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that In-Flight's Motion IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with Open Network
Architecture Access Tariffs

ORDER

Adopted: October 17, 1991; Released: October 18, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Ameritech Operating Companies (Ameritech) have petitioned for waiver of the *TRP Order*,[1] which specified the cost support material to be supplied in conjunction with Open Network Architecture (ONA) tariffs,[2] in two respects. First, Ameritech contends it is unable to disclose the Switching Cost Information System (SCIS), a computer model licensed by Bell Communications Research, Inc. (Bellcore) and used by several of the Bell Operating Companies (BOCs) to develop unit investment estimates for various switch technologies, because the model relies on proprietary information and trade secrets not owned by Ameritech. [3] Second, Ameritech asks that the format specified in the *TRP Order* for one of the supporting charts be altered. Comments on Ameritech's petition were submitted by American Telephone and Telegraph Company (AT&T), Ericsson Network Systems Inc. (Ericsson), MCI Telecommunications Corporation (MCI), and Northern Telecom Inc. (Northern Telecom). [4] The Common Carrier Bureau has determined that an interim waiver of the *TRP Order* requirement that the SCIS model be placed on the public record is warranted, to enable an informed determination whether third party access to SCIS should be authorized and, if so, on what terms.

II. BACKGROUND

2. In the *ONA Further Reconsideration Order* the Commission required the BOCs to provide engineering studies, time and wage studies, or other cost accounting studies to identify direct costs associated with ONA rate elements, and specified that cost support must include "supporting workpapers for estimates of costs, traffic, and revenues." *ONA Further Reconsideration Order* at para. 42. The *TRP Order* also specified that BOCs intending to use SCIS to develop the unit investment figures required by the *ONA Further Reconsideration Order*, or any other computer model, must file that model on the public record, together with a complete written description of the input, algorithms, and outputs of the model. *TRP Order* at para. 3 n. 9. These cost support materials are necessary to effectuate the Commission's concern that initial ONA rates be established on a firm foundation:

> [W]e want LECs to have the flexibility to price efficiently and the incentive to innovate. However, we also want to prevent LECs from setting excessively high rates and to protect against unreasonably discriminatory pricing.

ONA Further Reconsideration Order at para. 38. Cost support materials filed with tariffs are routinely available for public inspection. 47 C.F.R. §§ 0.451(a), 0.455(b)(11). The *TRP Order* provided that carriers finding themselves unable to furnish the data required by that Order could file applications for waiver, demonstrating good cause for reporting a different or lower level of cost support detail and indicating how these deficiencies would be rectified. *TRP Order* at para. 24.

III. PLEADINGS

1. SCIS Disclosure

3. Ameritech asserts three grounds in support of its request for waiver of the requirement that the SCIS model be provided on the public record. First, Ameritech states, it does not own the SCIS model and lacks the right to disclose it. SCIS was developed and is owned by Bellcore, which licenses it for use by six of the seven Regional Bell Operating Companies as well as other local exchange carriers. The principal use of the model is the development of cost studies for regulatory filing purposes. The license agreements grant a personal, non-transferable right to use the SCIS system solely within the licensee's own business, and the licensee agrees not to disclose licensed

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[1] Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1169, Sept. 19, 1991 (*TRP Order*).

[2] The tariffing requirements for implementation of ONA Plans were determined by the Commission in a previous Order. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, FCC No. 91-186, released July 11, 1991 (*ONA Further Reconsideration Order*), *petitions for reconsideration and clarification pending.*

[3] This aspect of Ameritech's petition for waiver embraces a related Bellcore model known as the Common Channel Switching Cost Information System (CCSIS), used to provide the investment associated with one ONA feature. Our discussion pertains to this related model as well.

[4] These comments address a final determination of the several TRP waiver requests submitted by carriers, and as explained in para. 9, will be considered in a subsequent Order. Northern Telecom's petition for declaratory ruling, also submitted Oct. 4, 1991, requested a determination that parties who provide proprietary information to the BOCs have standing to request confidential treatment of that information. That petition is granted, and comments received from Northern and other parties providing data for use in SCIS will be considered in resolving the TRP waiver requests.

information to anyone other than its employees with a need to know. The licensee may not copy the licensed information. Ameritech Petition at 3-4, Affidavit of James F. Britt at 2, 6-7. [5]

4. Ameritech's second ground for waiver of the SCIS filing requirement is that the model is valuable intellectual property of Bellcore, so that placing it on the public record constitutes an unconstitutional taking of Bellcore's property. Ameritech states that SCIS encompasses 25 modules that analyze investments for eight switching system technologies from five switching manufacturers. The maintenance and refinement of the SCIS model currently entail the work efforts of approximately 22 Bellcore employees and more than $22 million have been spent on development and maintenance since 1984. Ameritech states that some 35 to 40 percent of the system code (some 900,000 lines) is revised on an annual basis; licensing revenues from the BOCs alone represent approximately $4.8 million. Ameritech Petition at 4-5; Britt Affidavit at 2-3. According to Ameritech, this investment has been protected as proprietary by legends in the SCIS software and documentation, as well as the licensing arrangements, and constitutes a trade secret. Ameritech states that licensees are prohibited from "reverse engineering" or otherwise disassembling or deriving the source code or algorithms of the model. Ameritech Petition at 5-6, Britt affidavit at 6-7. Ameritech attaches a Memorandum of Law prepared by Bellcore which asserts that the SCIS model is a trade secret and constitutes valuable intellectual property, and is protected from public disclosure by the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905. [6] Ameritech notes that except for proprietary switch vendor information contained in the SCIS model, Bellcore is the exclusive owner of the model and the intellectual property therein. Bellcore Memorandum of Law at 2-7.

5. Ameritech's third argument is that the SCIS model comprises information on the switching system architecture, resource consumption, and pricing data characteristics of switching systems manufactured by five companies, and that this information is considered highly sensitive and proprietary by the vendors, who provide the necessary data to Bellcore only pursuant to strict non-disclosure and limited use agreements. Ameritech contends the publication of this information would likely terminate the vendors' provision of proprietary data to Bellcore, and that without the continued flow of this information the usefulness of SCIS as a costing tool would end. Ameritech Petition at 6-8; Britt Affidavit at 3-4.

6. Ameritech states that its initial ONA tariff filings were submitted several months ago and asserts it has demonstrated good cause for waiver of the requirement that SCIS be placed on the public record. Alternatively, Ameritech proposes to furnish the Commission with the SCIS model, including proprietary Bellcore documentation and switch vendor information, if the Commission will (a) waive the requirement, contained in Section 0.459(a) of the Commission's Rules, 47 C.F.R. § 0.459(a), that sensitive material be submitted simultaneously with a request for its nondisclosure; and (b) determine that Ameritech has demonstrated a case for nondisclosure under the Freedom of Information Act and the model, and associated vendor data, constitutes a trade secret under Section 0.457(d) of the Commission's Rules, 47 C.F.R. §0.457(d). Ameritech Petition at 8-9. Ameritech states that its proposal is contingent upon approval of this arrangement by Bellcore and its owners (the Regional Bell Operating Companies), as well as the affected switch vendors. *Id.* at 10.

2. Other TRP Requirements

7. Ameritech requests a waiver of the TRP Order requirement that carriers provide expenses for the basic local switching elements in a disaggregated form as shown on Chart NETREV. Ameritech argues that the expenses for these rate elements cannot be individually identified. Instead, Ameritech wishes to display the expenses for LS2, LS1, and Non-Premium on the LS2 line for bundled rate elements, and expenses for unbundled rate elements on line 4. According to Ameritech, its proposal is appropriate because the discounted rates have been established by the Commission in the Part 69 rules, based on the rate for LS2, and the carrier cannot individually identify the expenses for these rate elements. *Id.* at 11.

8. MCI asserts the information provided in the NETREV chart must not be diminished. MCI is the only petitioner on this issue to challenge all the BOCs jointly. MCI contends that RBOC claims -- that they do not keep cost records at the specified level of detail, or that such disaggregation is meaningless -- essentially challenge the rule itself rather than assert particular circumstances warranting waiver. MCI argues the BOCs should have sought waivers based on their circumstances rather than challenging the Commission requirement to complete the chart.

9. Other parties commenting on the waiver requests raise no issues specific to the Ameritech request. As discussed *infra*, their assertions will be considered in a subsequent Order resolving those several requests.

IV. DISCUSSION

1. Waiver of SCIS Disclosure

10. The controversy over SCIS disclosure long antedates these waiver requests, [7] and requires that we address two competing but fundamental policies. On one hand are the statutory predisposition to conduct on-the-record proceedings, as codified in the Administrative Procedure Act, and the preference for disclosure of information held by federal agencies, stated in the Freedom of Information Act (FOIA). On the other hand is the long-protected interest in maintaining the private, confidential status of commercial and financial information, including trade secrets. *See*

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[5] James F. Britt is the Bellcore employee responsible for development, maintenance, and licensing of the SCIS model.

[6] The Trade Secrets Act, 18 U.S.C. §1905, provides criminal penalties for officers or employees of federal agencies who permit information coming to them concerning trade secrets to be seen or examined by any person except as provided by law.

[7] Petitioners who oppose Ameritech's Transmittal Nos. 499 and 500 criticize the carrier's undocumented use of SCIS. Further, the proceeding established to amend Part 69 of the Commission's Rules to implement ONA, CC Docket No. 89-79, sought comment on the use of SCIS for cost justification.

Trade Secrets Act, *supra* n. 6. Our action in this Order is an interim step which will help us to reconcile these policies in the ONA context.

11. As noted, the cost support materials filed with tariffs are routinely available for public inspection. This practice reflects the fundamental interest in administrative decisions reached upon a public record, and is not lightly set aside. [8] Effective review of the ONA tariffs by third parties would be substantially compromised by the denial of any access to the SCIS model. It is not consonant with the pricing concerns stated in the *ONA Further Reconsideration Order*, the underlying purposes of that proceeding, or the on-the-record ratemaking process generally established by Commission Rules to allow the establishment of ONA services without meaningful public participation by parties most directly affected by the pricing practices of the BOCs. *See, e.g.*, Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.

12. Set against this premise, however, is Bellcore's proprietary stake in the intellectual property represented by the SCIS model, as well as substantial factual support for Ameritech's characterization of the model and associated vendor data as trade secrets. Ameritech has asserted that substantial competitive harm would follow the disclosure of proprietary and confidential information contained in data used by SCIS but supplied by switch vendors, and that both SCIS and the vendors' data constitute trade secrets protected from disclosure by exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). In the present circumstances, moreover, it appears possible that an on-the-record filing of the SCIS model and related data, even if legally defensible, might defeat the very purpose for which it would be required. If disclosure terminated switch vendors' willingness to contribute data to the model, or regional carriers' reliance upon it, it would become useless for regulatory oversight of rate development. The affected carriers, switch vendors, the Commission, and ultimately the public, would then bear the substantial cost of establishing some alternative method for developing costs for use in regulatory proceedings, both federal and state.

13. Because the SCIS model has not previously been of such central importance to a major series of tariff filings, it has not been examined in detail by Commission staff. An insufficiently informed judgment could have substantial, disruptive consequences for the parties owning, licensing, or contributing to SCIS. Thus, we will initially review a single carrier's SCIS model *in camera* before resolving the waiver requests filed by Ameritech and the other carriers. This will enable the Bureau to become more familiar with the operation of the SCIS model in a concrete context, and on the basis of that improved understanding, determine whether, and if so on what basis, to require disclosure of SCIS. Given the long pendency of Ameritech's ONA tariffs, the record already developed by petitioners, and the attention already focused on SCIS-related issues in that context, the pending Ameritech tariffs offer the best vehicle for expeditious and effective consideration of these issues in the context of an actual tariff filing. Deferring consideration of these matters until all regions have submitted their ONA tariffs would only further delay the implementation of ONA, and review of multiple SCIS-based filings is not necessary to determine issues of public disclosure.

14. For purposes of this preliminary review only then, we have determined that the SCIS model, including the associated data provided by switching system vendors, should be protected from public disclosure under Exemption 4 of the Freedom of Information Act. This determination is based upon Ameritech's description, supported by affidavits, of those aspects of the SCIS model and its licensure by Bellcore that Ameritech contends establish its characteristics as a trade secret. Based upon our review of the pleadings filed in response to the *TRP Order*, we find that review of the SCIS model itself will greatly assist our ability to decide the issues raised by the BOCs and others, arguing that SCIS is a trade secret. Our limited, immediate purpose is to acquire sufficient understanding of the SCIS model to determine whether its proprietary aspects can be effectively preserved, while still affording the interested public a useful opportunity to review the application of the model to these filings.

15. Until that determination is made, BOCs required to comply with the Commission's November 1, 1991 schedule for filing ONA implementation tariffs need not submit the SCIS model particulars required by the *TRP Order*. If the determination is made to require disclosure of SCIS to third parties, a schedule for submission of SCIS materials in compliance with that requirement will be established.

2. Waiver of NETREV Format

16. As described in para. 7, Ameritech also asks that the format specified in the *TRP Order* for Chart NETREV be altered. We have reviewed the NETREV chart and determine that Ameritech's proposed format is acceptable. While Ameritech incurs Switched Access expense for all three rate elements, the structure of the discounted LS1 and Non-Premium Rates has been mandated by the Commission's Part 69 Rules. In addition to the modification requested by Ameritech, we are changing charts NETREV and NEUT-1 to reflect the requirement in Section 69.113(e) that there be a non-premium rate for BSEs. Attachment A contains the revised charts.

V. ORDERING CLAUSES

17. We have tentatively determined that the SCIS model licensed by Bellcore to Ameritech, and associated data from switch vendors, constitute confidential materials exempt from disclosure under Section 552(b)(4) of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Commission's implementing regulations, 47 C.F.R. §§ 0.457(d), 0.459.

18. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. § 0.291, that the request for nondisclosure submitted as part of Ameritech's petition for waiver of the *TRP Order*, IS GRANTED to the extent provided herein.

19. IT IS FURTHER ORDERED, that the requirement of simultaneous submission of sensitive materials with a request for confidential treatment, specified in Section

[8] *See, e.g.*, AT&T Information Systems, FOIA Control Nos. 83-132, 83-135, 97 FCC 2d 47 (1984); ITT World Communications Inc., 85 FCC 2d 916 (1981).

0.459(a) of the Commission's Rules, 47 C.F.R. § 0.459(a), IS WAIVED for purposes of the SCIS materials to be submitted by Ameritech under the terms of this Order.

20. IT IS FURTHER ORDERED that Ameritech shall provide the SCIS model and associated documentation to the Bureau within 72 hours of the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Chart NETREV
(Revised)

NET REVENUE TEST

BSAs AND BSEs	A DEMAND	B REVENUES	C EXPENSES	D NET REVENUE
1 LS2				NA
2 LS1			NA	NA
3 Non Premium			NA	NA
4 LS2 Trunkside BSA				NA
5 LS1 Trunkside BSA			NA	NA
6 Non Premium Trunkside BSA			NA	NA
7 LS1 Lineside BSA			NA	NA
8 Non Premium Lineside BSA			NA	NA
PREMIUM BSES				
9 Alternate Routing				NA
10 Answer Supervision With a Line Side Interface				NA
11 Automatic Protection Switching				NA
12 Bridging				NA
13 Call Denial				NA
14 Call Detail Recording Reports				NA
15 Called Directory Number Delivery via 900NXX				NA
16 Called Directory Number Delivery via DID				NA
17 Called Directory Number Delivery via ICLID				NA
18 Calling Billing Number Delivery				NA
19 Carrier Selection on Reverse Charge Multiline Hunt Group				NA
20 Conditioning				NA
21 DID Trunk Queing				NA
22 Fast Select Acceptance				NA
23 Faster Signalling on DID				NA
24 Flexible ANI Information Digits				NA
25 Line Monitor Service				NA
26 Make Busy Key				NA
27 Message Desk (SMDI)				NA
28 Message Desk (SMDI) – Expanded				NA
29 Message Waiting Indicator – Activation (Audible)				NA
30 Message Waiting Indicator – Expanded				NA
31 Multiline Hunt Group				NA
32 Multiline Hunt Group – Circular				NA
33 Multiline Hunt Group – C.O. Announcement				NA
34 Multiline Hunt Group – Individual Access to Each Port				NA
35 Multiline Hunt Group – Overflow				NA
36 Multiline Hunt Group – Preferred				NA
37 Multiline Hunt Group – UCD with queing				NA
38 Multiline Hunt Group – Uniform Call Distribution Line Hunting				NA
39 Network Reconfiguration				NA
40 Reverse Charge Acceptance				NA
41 RPOA Preselection				NA
42 Secondary Channel Capability				NA
43 Service Code Denial				NA
44 Statistical Multiplexer				NA
45 Tandem Routing				NA
46 Three Way Call Transfer				NA
47 Three Way Calling				NA
48 Uniform Seven – Digit Access Number – Remote Call Forwarding				NA
49 800 Service to DID				NA
50 Other BSE				NA
51 Other BSE				NA
52 Other BSE				NA
53 Other BSE				NA
54 Other BSE				NA
55 Other BSE				NA

Chart NETREV
(Revised)

NET REVENUE TEST

BSAs AND BSEs	A DEMAND	B REVENUES	C EXPENSES	D NET REVENUE
NON-PREMIUM BSES				
56 Alternate Routing			NA	NA
57 Answer Supervision With a Line Side Interface			NA	NA
58 Automatic Protection Switching			NA	NA
59 Bridging			NA	NA
60 Call Denial			NA	NA
61 Call Detail Recording Reports			NA	NA
62 Called Directory Number Delivery via 900NXX			NA	NA
63 Called Directory Number Delivery via DID			NA	NA
64 Called Directory Number Delivery via ICLID			NA	NA
65 Calling Billing Number Delivery			NA	NA
66 Carrier Selection on Reverse Charge Multiline Hunt Group			NA	NA
67 Conditioning			NA	NA
68 DID Trunk Queing			NA	NA
69 Fast Select Acceptance			NA	NA
70 Faster Signalling on DID			NA	NA
71 Flexible ANI Information Digits			NA	NA
72 Line Monitor Service			NA	NA
73 Make Busy Key			NA	NA
74 Message Desk (SDMI)			NA	NA
75 Message Desk (SMDI) – Expanded			NA	NA
76 Message Waiting Indicator – Activation (Audible)			NA	NA
77 Message Waiting Indicator – Expanded			NA	NA
78 Multiline Hunt Group			NA	NA
79 Multiline Hunt Group – Circular			NA	NA
80 Multiline Hunt Group – C.O. Announcement			NA	NA
81 Multiline Hunt Group – Individual Access to Each Port			NA	NA
82 Multiline Hunt Group – Overflow			NA	NA
83 Multiline Hunt Group – Preferred			NA	NA
84 Multiline Hunt Group – UCD with queing			NA	NA
85 Multiline Hunt Group – Uniform Call Distribution Line Hunting			NA	NA
86 Network Reconfiguration			NA	NA
87 Reverse Charge Acceptance			NA	NA
88 RPOA Preselection			NA	NA
89 Secondary Channel Capability			NA	NA
90 Service Code Denial			NA	NA
91 Statistical Multiplexer			NA	NA
92 Tandem Routing			NA	NA
93 Three Way Call Transfer			NA	NA
94 Three Way Calling			NA	NA
95 Uniform Seven-Digit Access Number – Remote Call Forwarding			NA	NA
96 800 Service to DID			NA	NA
97 Other BSE			NA	NA
98 Other BSE			NA	NA
99 Other BSE			NA	NA
100 Other BSE			NA	NA
101 Other BSE			NA	NA
102 Other BSE			NA	NA
Total:				

Notes: Total Net Revenue = (Sum of revenues less expenses for rows 4 thru 102) – (Revenues less expenses for rows 1 thru 3).
Line 1, Column C: Include total bundled Switched Access expenses.
Line 4, Column C: Include total unbundled Switched Access BSA expenses.
Expenses for all tariffed BSEs should be displayed in rows 9 through 55.

Chart NEUT-1
(Revised)

Demonstration of Revenue Neutrality
Recurring Rates

Carrier Name/ONA Name	A Base 12 Month Demand Current	B Base 12 Month Demand Proposed	C Current Rates	D Proposed Rates	E Revenue at Current Rates (A*C)	F Revenue at Proposed Rates (B*D)
1 LS2		NA		NA		NA
2 LS1		NA		NA		NA
3 Non Premium		NA		NA		NA
4 LS2 Trunkside BSA	NA		NA		NA	
5 LS1 Trunkside BSA	NA		NA		NA	
6 Non Premium Trunkside BSA	NA		NA		NA	
7 LS1 Lineside BSA	NA		NA		NA	
8 Non Premium Lineside BSA	NA		NA		NA	
PREMIUM BSES						
9 Alternate Routing	NA		NA		NA	
10 Answer Supervision With a Line Side Interface	NA		NA		NA	
11 Automatic Protection Switching	NA		NA		NA	
12 Bridging	NA		NA		NA	
13 Call Denial	NA		NA		NA	
14 Call Detail Recording Reports	NA		NA		NA	
15 Called Directory Number Delivery via 900NXX	NA		NA		NA	
16 Called Directory Number Delivery via DID	NA		NA		NA	
17 Called Directory Number Delivery via ICLID	NA		NA		NA	
18 Calling Billing Number Delivery	NA		NA		NA	
19 Carrier Selection on Reverse Charge Multiline Hunt Group	NA		NA		NA	
20 Conditioning	NA		NA		NA	
21 DID Trunk Queing	NA		NA		NA	
22 Fast Select Acceptance	NA		NA		NA	
23 Faster Signalling on DID	NA		NA		NA	
24 Flexible ANI Information Digits	NA		NA		NA	
25 Line Monitor Service	NA		NA		NA	
26 Make Busy Key	NA		NA		NA	
27 Message Desk (SDMI)	NA		NA		NA	
28 Message Desk (SMDI) - Expanded	NA		NA		NA	
29 Message Waiting Indicator - Activation (Audible)	NA		NA		NA	
30 Message Waiting Indicator - Expanded	NA		NA		NA	
31 Multiline Hunt Group	NA		NA		NA	
32 Multiline Hunt Group - Circular	NA		NA		NA	
33 Multiline Hunt Group - C.O. Announcement	NA		NA		NA	
34 Multiline Hunt Group - Individual Access to Each Port	NA		NA		NA	
35 Multiline Hunt Group - Overflow	NA		NA		NA	
36 Multiline Hunt Group - Preferred	NA		NA		NA	
37 Multiline Hunt Group - UCD with queing	NA		NA		NA	
38 Multiline Hunt Group - Uniform Call Distribution Line Hunting	NA		NA		NA	
39 Network Reconfiguration	NA		NA		NA	
40 Reverse Charge Acceptance	NA		NA		NA	
41 RPOA Preselection	NA		NA		NA	
42 Secondary Channel Capability	NA		NA		NA	
43 Service Code Denial	NA		NA		NA	
44 Statistical Multiplexer	NA		NA		NA	
45 Tandem Routing	NA		NA		NA	
46 Three Way Call Transfer	NA		NA		NA	
47 Three Way Calling	NA		NA		NA	
48 Uniform Seven-Digit Access Number - Remote Call Forwarding	NA		NA		NA	
49 800 Service to DID	NA		NA		NA	
50 Other BSE	NA		NA		NA	
51 Other BSE	NA		NA		NA	
52 Other BSE	NA		NA		NA	
53 Other BSE	NA		NA		NA	
54 Other BSE	NA		NA		NA	
55 Other BSE	NA		NA		NA	

Chart NEUT - 1
(Revised)

Demonstration of Revenue Neutrality
Recurring Rates

Carrier Name/ONA Name	A Base 12 Month Demand Current	B Base 12 Month Demand Proposed	C Current Rates	D Proposed Rates	E Revenue at Current Rates (A*C)	F Revenue at Proposed Rates (B*D)
NON-PREMIUM BSES						
56 Alternate Routing	NA		NA		NA	
57 Answer Supervision With a Line Side Interface	NA		NA		NA	
58 Automatic Protection Switching	NA		NA		NA	
59 Bridging	NA		NA		NA	
60 Call Denial	NA		NA		NA	
61 Call Detail Recording Reports	NA		NA		NA	
62 Called Directory Number Delivery via 900NXX	NA		NA		NA	
63 Called Directory Number Delivery via DID	NA		NA		NA	
64 Called Directory Number Delivery via ICLID	NA		NA		NA	
65 Calling Billing Number Delivery	NA		NA		NA	
66 Carrier Selection on Reverse Charge Multiline Hunt Group	NA		NA		NA	
67 Conditioning	NA		NA		NA	
68 DID Trunk Queing	NA		NA		NA	
69 Fast Select Acceptance	NA		NA		NA	
70 Faster Signalling on DID	NA		NA		NA	
71 Flexible ANI Information Digits	NA		NA		NA	
72 Line Monitor Service	NA		NA		NA	
73 Make Busy Key	NA		NA		NA	
74 Message Desk (SDMI)	NA		NA		NA	
75 Message Desk (SMDI) - Expanded	NA		NA		NA	
76 Message Waiting Indicator - Activation (Audible)	NA		NA		NA	
77 Message Waiting Indicator - Expanded	NA		NA		NA	
78 Multiline Hunt Group	NA		NA		NA	
79 Multiline Hunt Group - Circular	NA		NA		NA	
80 Multiline Hunt Group - C.O. Announcement	NA		NA		NA	
81 Multiline Hunt Group - Individual Access to Each Port	NA		NA		NA	
82 Multiline Hunt Group - Overflow	NA		NA		NA	
83 Multiline Hunt Group - Preferred	NA		NA		NA	
84 Multiline Hunt Group - UCD with queing	NA		NA		NA	
85 Multiline Hunt Group - Uniform Call Distribution Line Hunting	NA		NA		NA	
86 Network Reconfiguration	NA		NA		NA	
87 Reverse Charge Acceptance	NA		NA		NA	
88 RPOA Preselection	NA		NA		NA	
89 Secondary Channel Capability	NA		NA		NA	
90 Service Code Denial	NA		NA		NA	
91 Statistical Multiplexer	NA		NA		NA	
92 Tandem Routing	NA		NA		NA	
93 Three Way Call Transfer	NA		NA		NA	
94 Three Way Calling	NA		NA		NA	
95 Uniform Seven-Digit Access Number - Remote Call Forwarding	NA		NA		NA	
96 800 Service to DID	NA		NA		NA	
97 Other BSE	NA		NA		NA	
98 Other BSE	NA		NA		NA	
99 Other BSE	NA		NA		NA	
100 Other BSE	NA		NA		NA	
101 Other BSE	NA		NA		NA	
102 Other BSE	NA		NA		NA	
Total:						

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC.	File No. BPH-861215MI
SAR BROADCASTING, INC.	File No. BPH-861216MB
BLEDSOE COMMUNICATIONS, LTD.	File No. BPH-861216MD
HEIDELBERG-STONE BROADCASTING COMPANY	File No. BPH-861217MA
DG ENTERPRISES, INC.	File No. BPH-861217ML
GOODLETTSVILLE COMMUNITY BROADCASTING, INC.	File No. BPH-861217MM
Rudy A. Lindsay, Sr. and Faye B. Lindsay, Husband and Wife, a tenancy by the entireties, d/b/a LINDSAY CHRISTIAN BROADCASTING COMPANY	File No. BPH-861217MO
WILLIAM E. BENNS, III	File No. BPH-861217MQ
TENNESSEE WOMEN IN BROADCASTING, INC.	File No. BPH-861217MT
RICHARD S. FRANCIS	File No. BPH-861217NA

For Construction Permit for
New FM station, Channel 246C2,
Goodlettsville, Tennessee

ORDER

Adopted: October 22, 1991; Released: October 31, 1991

By the Commission:

1. On September 16, 1991 the Review Board certified this case to us for a final decision because one of its members had recused himself from the matter and the other two were of different opinions as to the action to be taken in response to the exceptions that had been filed to the initial decision. FCC 91R-84, rel. Oct. 4, 1991. It is not necessary for us to intervene at this point, however. By action effective October 1, 1991, we appointed a fourth member to the Board who will be eligible to sit in judgment on this case and break the deadlock after reviewing the record and reading the transcript of the oral argument on the exceptions. *See* 47 C.F.R. §0.361(c).

2. ACCORDINGLY, IT IS ORDERED that this case IS REMANDED to the Review Board for further consideration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-608

Nebraska Public Safety Plan

ORDER

Adopted: October 23, 1991; Released: October 31, 1991

By the Chief, Land Mobile and Microwave Division and the Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Nebraska (Region 26) Public Safety Plan (Plan) on April 3, 1990, 5 FCC Rcd 2457 (1990).

2. By letter dated July 18, 1991, the Region proposed to amend its Plan. The proposed amendment would change the channel allotments to provide better separation between channels to be used at the same transmitter site. The Commission placed the proposal on Public Notice for comments on August 23, 1991, and received no comments.

3. We have reviewed the proposed amendment to the Region 26 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Nebraska (Region 26) IS AMENDED, as set forth in the Region's proposal of July 18, 1991. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

Will McGibbon
Chief, Spectrum Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE BELL ATLANTIC TELEPHONE COMPANIES — RM-6723

Petition to Establish
Uniform Dialing Plan
From Pay Telephones

ORDER INVITING COMMENTS TO SUPPLEMENT THE RECORD

Adopted: October 7, 1991; Released: October 9, 1991

Comment Date: November 22, 1991
Reply Comment Date: December 23, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. On April 14, 1989, Bell Atlantic filed a petition requesting that the Commission begin a rulemaking proceeding on "billed party preference."[1] Under Bell Atlantic's proposal, all interexchange calls dialed from payphones in equal access areas on a 0+ basis (*i.e.*, "0" plus an interexchange number, with no access code[2] preceding the "0") would be routed to the interexchange carrier (IXC) chosen by the customer who will be billed for the call, instead of to the IXC to which the payphone is presubscribed.[3] On April 26, 1989, the Commission released a Public Notice inviting comment on Bell Atlantic's petition.[4] There have been several recent developments that might affect whether the Commission should begin a rulemaking proceeding on this subject. Therefore, we invite interested parties to file comments to update the record.

II. BACKGROUND

2. The premise of Bell Atlantic's petition is that the court administering the Modification of Final Judgment (MFJ) has required the Bell Operating Companies (BOCs) and GTE to work toward deploying billed party preference. Bell Atlantic bases its conclusion that the MFJ Court has required the development of billed party preference on language in an October 1988 Court decision that "a system which permits the billed party to select the interexchange carrier of his choice simply by dialing 0+ most perfectly comports with the language and purposes of the decree."[5] Bell Atlantic claims that if billed party preference is limited to BOC and GTE payphones, premises owners will replace these phones with other payphones so that they may earn the commissions that IXCs pay for presubscription. Accordingly, Bell Atlantic requests the Commission to: (1) require that all local exchange carriers that provide equal access to interexchange carriers offer billed party preference for 0+ interexchange payphone calls; and (2) amend Part 68 of its Rules to ensure that private payphones cannot override billed party preference.

3. In its petition, Bell Atlantic states that deployment of billed party preference in the near term would present certain operational problems. Specifically, it states that the service would increase call processing time for collect, third number, and calling card calls by one-half to four seconds. This delay could be eliminated, Bell Atlantic says, when telephone companies have deployed Common Channel Signaling System 7 (SS7) at the tandem and the "operator" switch and have established SS7 interfaces with interexchange carriers. In addition, Bell Atlantic states that implementation of billed party preference requires the development of new switch software and the modification of switch hardware.[6] In light of these obstacles, Bell Atlantic notes that it would not oppose deferral of billed party preference until 1993, when, it projects, such problems could be eliminated.

III. DISCUSSION

4. In the two years since Bell Atlantic filed its petition, there have been a number of changes in the telecommunications industry that might affect the billed party preference proposal. We encourage interested parties to comment on what effect, if any, the developments listed below might have on the issues raised by the Bell Atlantic

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[1] Bell Atlantic Petition for Rulemaking, RM-6723 (April 14, 1989).

[2] "The term 'access code' means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence." 47 U.S.C. § 226(a)(1) (1991); 56 Fed. Reg. 18524 (1991) (to be codified at 47 C.F.R. § 64.708(a)).

[3] For example, calling card calls would be routed to the IXC that issued the calling card, and collect calls would be routed to the called party's chosen IXC. The IXC to which a particular line is presubscribed for 0+ traffic could, but would not have to be, the same IXC to which the line is presubscribed for 1+ traffic.

[4] Pleading Cycle Established for Bell Atlantic Petition for Rule Making on Pay Telephones, Public Notice, RM-6723, DA 89-452 (April 26, 1989). On November 26, 1990, Bell Atlantic filed a motion asking the Commission to render a decision on its petition. Bell Atlantic Motion for Commission Decision, RM-6723 (Nov. 26, 1990).

[5] United States v. Western Elec. Co., Inc., 698 F. Supp. 348, 361 (D.D.C. 1988) (*BOC Payphone Decision*). *See also* United States v. GTE Corp., No. 83-1298, slip op. at 2-5 (D.D.C. December 23, 1988) (*GTE Payphone Decision*). In the *BOC Payphone Decision*, the Court found that the Line Information Data Base (LIDB) that would permit implementation of billed party preference would not be completed for two or three years, and concluded that the BOCs should implement an interim system of equal access. The Court stated, however, that it "expects that the Regional Companies will continue expeditiously to perfect the LIDB system which, when placed into service, will permit full compliance with the decree. "*BOC Payphone Decision*, 698 F. Supp. at 367.

[6] *See* Bell Atlantic Motion for Commission Decision at 5.

petition. Commenters should also address any other technological, regulatory, or legal developments that they believe should affect a decision on whether the Commission should begin a rulemaking proceeding on billed party preference.

5. In October 1990, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990, which directed the Commission to adopt rules requiring aggregators, such as hotels, hospitals, and payphone providers, to ensure that consumers are able to obtain access to the operator service provider (OSP) of their choice.[7] The Commission implemented the Congressional mandate by ordering that payphone providers unblock equal access codes within six months of the effective date of the new rules, and that all OSPs establish "800" or "950" access numbers within the same period.[8] The Commission also imposed unblocking requirements on other aggregators and decided that compensation should be prescribed for owners of competitive public pay telephones. The Commission requested further comment on certain issues regarding the compensation mechanism.[9]

6. In addition, on August 1, 1991, the Commission adopted an Order in the *800 Database* proceeding that is likely to result in expediting the deployment of SS7 in the BOC and GTE networks.[10] Finally, many of the BOCs recently have requested waivers of the Commission's Part 69 Rules to offer access to LIDB in order to provide various billing validation services, such as calling card validation, verification of third-party billing data, and screening of collect called numbers.[11]

7. We invite interested parties to update the record by addressing what, if any, relevance these or other recent developments have to a Commission decision about whether to initiate a rulemaking proceeding in response to Bell Atlantic's petition. Commenters are also free to update the record in any other respect.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that COMMENT IS INVITED in this proceeding.

9. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **November 22, 1991,** and reply comments SHALL BE FILED with the Secretary on or before **December 23, 1991.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, The Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Policy
Common Carrier Bureau

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[7] 47 U.S.C. § 226 (1991).

[8] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rule Making, FCC 91-214, para. 6 (released August 9, 1991).

[9] *Id.* at paras. 33-44.

[10] Provision of Access for 800 Service, CC Docket No. 86-10, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, FCC 91-249 (released September 4, 1991).

[11] *See e.g.*, Petition of the Bell Atlantic Telephone Companies for Waiver of Part 69 of the Commission's Rules (June 24, 1991); Southwestern Bell Telephone Company's Petition for Waiver of Part 69 of the Commission's Rules (June 14, 1990); Petition of NYNEX Telephone Companies for Waiver of Part 69 of the Commission's Rules (April 15, 1991); BellSouth Telephone Companies' Petition for Waiver of Part 64 and Part 69 of the Commission's Rules (Nov. 27, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-309

In re Applications of

Frank K. Spain (hereafter "Spain")	File No. BPH-900119MN
Temecula Valley Broadcasting (hereafter "TVB")	File No. BPH-900122ML
Kimler Broadcasting, Inc. (hereafter "Kimler")	File No. BPH-900122MN
Artistic Airwave Broadcasters (hereafter "Artistic")	File No. BPH-900122MP
The AnnGie Corporation (hereafter "AnnGie")	File No. BPH-900122MU
Laura Wilkinson Herron (hereafter "Herron")	File No. BPH-900122MY
Avid Communications, Inc. (hereafter "Avid")	File No. BPH-900122NF
Natalie Lederer Rogers (hereafter "Rogers")	File No. BPH-900122NN
Temecula Communications, a California Limited Partnership (hereafter "TCLP")	File No. BPH-900122NS
New Town Communications, Inc. (hereafter "New Town")	File No. BPH-900122NR (Dismissed Herein)
MCI Broadcasting, Limited Partnership (hereafter "MCI")	File No. BPH-900122MO (Dismissed Herein)
Alexsii Corporation (hereafter "Alexsii")	File No. BPH-900122NQ (Dismissed Herein)
Los Amigos Media, A Limited Partnership (hereafter "Los Amigos")	File No. BPH-900122MM (Dismissed Herein)
Temecula Broadcasters, Inc. (hereafter "TBI")	File No. BPH-900122NM (Dismissed Herein)
Valley View Broadcasting Corporation (hereafter "Valley View")	File No. BPH-900122NW (Dismissed Herein)
B & M Broadcasting, Inc. (hereafter "B & M")	File No. BPH-900122NY (Dismissed Herein)
FM Data Broadcasting, Inc. (hereafter "FM Data")	File No. BPH-900122MS (Dismissed Herein)
Temecula Broadcasting Company (hereafter "TBC")	File No. BPH-900119MM (Dismissed Herein)

For Construction Permit for a New FM Station on Channel 233A (94.5 MHz) in Temecula, California

HEARING DESIGNATION ORDER

Adopted: October 17, 1991; Released: October 31, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. On July 15, 1991 and September 25, 1991, New Town and MCI, respectively, requested dismissal of their applications for a construction permit for a Temecula facility. The requests include declarations that the applicants have not been promised and have not received any consideration for the requested dismissals. Therefore, New Town and MCI have complied with 47 U.S.C. § 311(c)(3) and 47 C.F.R. § 73.3525(a) and their applications will be dismissed.

3. Los Amigos, FM Data, TBI, Alexsii, Valley View, and B & M have not paid the hearing fee by July 15, 1991, the date set forth in *Public Notice*, Mimeo No. 13110, released May 15, 1991. Accordingly, their applications will be dismissed. *See* revised Section 73.3573(g)(2) of the Commission's Rules and *Report and Order* in Gen. Doc. 90-264 ("Proposals to Reform the Commission's Com-

parative Hearing Process"), 6 FCC Rcd 157, 157-8 and 170 (1990); *Erratum*, 6 FCC Rcd 3472 (1991); *recon. granted in part*, 6 FCC Rcd 3403 (1991).

4. *Preliminary Matters.* An engineering study of the proposals of Spain, AnnGie, Rogers, and TCLP reveals that these four applicants are short spaced in the following manner:

STATION	SHORT SPACED APPLICANT(S)	LOCATION
KIKF-FM	Spain; AnnGie; Rogers	Garden Grove, Ca.
KTWV-FM	Spain; AnnGie; Rogers; TCLP	Los Angeles, Ca.
KWST-FM	Spain; AnnGie; Rogers; TCLP	Brawley, Ca.[1]

5. In the *Second Report and Order* in MM Docket No. 88-375, 4 FCC Rcd. 6375 (1989), the Commission revised Section 73.207 to allow licensees of Class A FM stations an opportunity to increase effective radiated power up to a maximum of 6 kW at an antenna height above average terrain of 100 meters or its equivalent. This increase in power required the adoption of increased separation distances for Class A stations to prevent interference. Existing stations at locations that did not meet the new separation distances that became short spaced as a result of the rule change were "grandfathered." The new rules became effective on October 2, 1989.

6. Channel 233A was allotted to Temecula, California via the Commission's *Notice of Proposed Rule Making*, MM Docket No. 88-65, 3 FCC Rcd. 823 (1988), and *Report and Order* in MM Docket No. 88-65, 4 FCC Rcd. 7895 (1989).[2] The applicants for this allocation were required to comply with the new spacing rules,[3] because the window opened on December 22, 1989, almost three months after the effective date of the new rules. *See, Report and Order, supra,* in MM Docket No. 88-65 at 7897. Since the Temecula rulemaking was initiated before October 2, 1989, the effective date of the new Section 73.207 rules, but released after that date, the applicants for the Temecula allotment could have assumed they were not required to comply with the "new" Section 73.207 rules. This "gray" area has led to some confusion by applicants of several FM allotments, including the short spaced applicants herein.

7. In a clarification of its policy regarding applications for construction permits filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM allotments filed prior to October 2, 1989, the Commission stated in a memorandum opinion released earlier this year that, "[s]uch applications must meet the new spacing requirements with respect to all facilities and allotments *except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment.* In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the new allotment. *"Memorandum Opinion and Order*, MM Docket No. 88-375, 6 FCC Rcd. 3417, 3418 at n. 7 (1991) (emphasis added).

8. Under the old rules, the Temecula allotment met the distance separation requirements with respect to the licensed facilities of KWST-FM. Under the new rules, the allotment became short spaced by 9.6 kilometers to KWST. Since the Temecula allotment became short spaced because of the rule change, the allotment was "grandfathered" and applications filed pursuant thereto are *permitted to be short spaced under the new rules only to the licensed facilities of KWST.*

9. The *Report and Order, supra,* in MM Docket No. 88-65, which allotted the channel to Temecula, did not mention that the only allowable short spacing under the new rules was with KWST. This, combined with the allotment's newly grandfathered status, apparently resulted in an assumption by the short spaced applicants that any new short spacing created as a result of the implementation of the new rules, such as that with KIKF or KTWV, was permissible. The usual consequence of short spacing is dismissal. However, considering the lack of clarity of the rules prior to adoption of the *Memorandum Opinion and Order, supra,* in this instance, we believe that such a harsh result, *i.e.*, the return of the short spaced applica-

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[1] On August 6, 1990, New Town filed petitions to deny the applications of the four applicants listed above, based on the general contention that they "fail to meet the minimum distance separation requirements of Section 73.207 of the Commission's Rules or qualify for processing under the grandfather provisions of Section 73.213(c)(1)..." Petition at 3. Each of the four applicants filed an opposition to New Town's petition and New Town, in turn, filed a reply against each of them.

Specifically, New Town contends that these applicants "are unacceptable for filing pursuant to the Commission's policy as stated in *Donovan Burke*, 104 FCC 2d 843, 60 RR 2d 110 (1986), and should be dismissed as having been inadvertently accepted for filing under Section 73.3566(a) of the Commission's Rules." Id. New Town's interpretation of the *Donovan Burke* policy is that short spaced applications, which are in violation of the minimum distance separation requirements after the expiration of the period for filing amendments as of right, are considered unacceptable for filing and are to be returned if other applicants propose fully spaced sites. As of June 11, 1990, the deadline for filing amendments as of right, there were nine other applicants who had proposed fully spaced sites. In light of the action taken herein, New Town's petition will be denied.

[2] Three counterproposals, filed by various parties, requested the allotment of Channel 225A to Sun City, California, Rancho California, California, and Temecula, California. Said counterproposals were filed in response to a petition filed by Claridge Broadcasting Corp. ("Claridge"), licensee of Station KCMJ-FM, Channel 224A, Indio, California. Claridge had requested the substitution of Channel 225B for Channel 224A at Indio and modification of its license to specify operation on the higher powered channel. To accommodate its proposal, Claridge requested the deletion of Channel 225A at East Hemet, California.

The Commission granted this request and after due consideration allotted Channel 225A to Sun City. Subsequently, an engineering analysis was conducted to determine whether any additional channels were available for allotment to the remaining communities. The Commission found that Channel 233A was available for allotment to either Temecula or Rancho California as a first local service. After consideration of all relevant factors, the Commission determined the public interest would be better served by the allotment of the channel to Temecula. *See, Report and Order, supra,* in MM Docket No. 88-65, at 7896 and 7897.

[3] *See, Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375, 6382 (1989).

tions with no opportunity to correct the defect, is unwarranted. As the D.C. Circuit has held, fundamental fairness requires that the more exacting the application standard, the greater the Commission's obligation to be explicit about any prerequisites for consideration. *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985).

10. Accordingly, Spain, AnnGie, Rogers, and TCLP, will be required to submit an amendment, which eliminates their short spacing with KIKF-FM and KTWV-FM and which brings their applications into compliance with 47 C.F.R. § 73.207, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. *Mexican Agreement.* On August 6, 1990, the last day to file petitions to deny, TCLP filed a petition to deny the application of TBC based on the contention that the facilities specified by TBC are violative of Annex IV of the Mexican Agreement. TBC has filed an opposition and TCLP a reply. Specifically, TCLP contends that TBC "has used an effective radiated power of ... 0.407 kW and an antenna... [HAAT] of 245 meters (804 feet). Referring to Annex IV of the Mexican Agreement..., it can be seen that for an antenna height of 804 feet, the power should be approximately... 0.302 kW." Thus, TCLP asserts, TBC's ERP exceeds by 34.7% that permitted by the Mexican Agreement.

12. As explained in Section 73.1650 of our Rules, FM authorizations are subject to compliance with the Mexican Agreement, which defines, among other things, classes of stations by power and height limitations and specifies minimum distance separation requirements. For convenient reference, those separation requirements have been incorporated in Section 73.207 as Tables B and C. Since some domestic classes are not defined in this agreement or may have different limitations, Sections 73.207(b)(2) and (3) explain what substitutions must be made *in order to apply the tables correctly.*

13. The Mexican Agreement contains a table of allotments which associates classes of stations, as defined in the Agreement, with specific channels and communities. Consequently, allotments within 320 kilometers of the Mexican border are listed twice - once in our domestic table (Section 73.202) and once in the Agreement. Domestically, the Class A limitations are 6 kW at 100 meters, but in the Agreement they are 3 kW at 91 meters. Thus, applications for a vacant Class A allotment which specify facilities in excess of 3 kW at 91 meters within the Mexican border zone are not acceptable for filing unless the table of allotments in the Mexican Agreement has already been negotiated and changed to a higher class.

14. The Temecula allocation in this proceeding is a Class A allotment both domestically and internationally. Pursuant to Section 73.207(b)(3) of the Rules, the maximum facility possible for a Class A FM station located within 320 kilometers of the Mexican border is 3 kW at 91 meters, but other combinations of ERP and HAAT are acceptable if in compliance with the curves of Annex IV of the Mexican Agreement, which, *inter alia*, imposes strict limitations on the power, height, and proximity of domestic FM stations near the Mexican border areas.

15. An engineering review of TBC's application reveals that the TBC proposal maintains ERP and HAAT parameters that exceed Annex IV of the Mexican Agreement. As stated previously, TBC used an ERP of 0.407 kW with an antenna HAAT of 804 feet. TCLP is correct in its assertion that an antenna height of 804 feet can only accommodate an ERP of approximately 0.302. Consequently, TBC's application is in violation of 47 C.F.R. § 73.207(b)(3) and the Mexican Agreement.

16. In the interest of fairness to competing applicants and other affected parties, and to expedite service to the public, the Commission's "hard look" processing standards adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), specify that applications must be acceptable for filing at the close of the amendment as of right period. The "hard look" processing procedures were intended to place a greater burden on the applicant to make more efficient use of Commission staff and resources in an effort to provide service to the public expeditiously. *See, e.g., R.A.D. Broadcasting Corporation*, 4 FCC Rcd 4772 (1989), *appeal dismissed* No. 89-1413 (D.C. Cir. February 27, 1990). Moreover, the "hard look" procedures state that antenna height and power are evaluated in the course of an acceptability study and that those parameters may be affected by international agreements. Further, the instructions to FCC Form 301 admonish applicants to become familiar with the Commission rules, which make specific reference to the Mexican Agreement. Precedent makes clear that applicants are on notice that the provisions of the international agreements may affect the acceptability of their applications. *See Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991, *affirming Texas Media group*, 5 FCC Rcd 2851(1990).

17. Consequently, TBC had notice of the existence of the Mexican Agreement, as well as the responsibility to conform its proposal to the terms of that treaty by the close of the period for filing amendments as of right to insure that its application would be found acceptable for filing. Parenthetically, to accept an amendment at this point in time, after the close of the amendment as of right period, would be unfair to the other applicants in this proceeding who fully complied with our acceptability criteria as of the amendment as of right date. *See, PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988). Therefore, pursuant to 47 C.F.R. § 73.3566, TCLP's petition to deny will be granted and TBC's application will be dismissed herein as inadvertently accepted for filing.

18. *City Boundaries.* On August 6, 1990, TCLP filed a petition to deny the application of Rogers, to which Rogers has filed an opposition and TCLP a reply. TCLP, citing the Commission's "hard look" processing policy, contends that neither application was substantially complete based on its failure to submit a "map depicting the boundaries of Temecula. Indeed, its only showing of even the location of Temecula is its Exhibit.... which is a large-scale contour map upon which Temecula is depicted only as a dot...."Petition at 2. The heart of TCLP's assertion is that, though Rogers's Temecula dot lies well within the 70 dBu contour depicted in its exhibit, the staff must make two assumptions in order to confidently ascertain that Rogers has complied with the city-grade requirements. First, the staff must assume "that the dot lies at the center of the community," and second, "that the outer boundaries of the community do not extend beyond the 70 dBu contour as depicted... The indulgence of such assumptions would be the antithesis of 'hard look' processing....." Id.

19. We disagree. An inquiry into the size of the City of Temecula revealed that its population, based on the 1980 census, is 1,783. Opposition at 10. According to Rogers's engineering data, Temecula encompasses 3.4 square miles,

based on a review of the U.S. Census map and several others. Id. at 5. This, combined with the fact that "Temecula... at the time of filing... was reflected on routinely available and published maps only with a small dot'," renders as specious TCLP's argument. Id. at 7. Moreover, as the Commission has stated," [w]here exact replications of the community of license's legal boundaries are not possible or provided, the staff deems acceptable those contour maps clearly placing the principal community within the 70 dBU contour. *"See, Richard Culpepper,* 5 FCC Rcd 2983, 2985 (1990). [4] The contour map submitted by Rogers met this criteria. Consequently, its application was properly accepted for tender. Therefore, the petition to deny filed by TCLP will be denied.

20. *Environmental Issue.* Our engineering study reveals that, of all the applicants, only Artistic has addressed how it would resolve any RF exposure to workers on its tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each of the others may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice,* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (Released: January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If an application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since only Artistic has shown how workers engaged in maintenance and repair on its tower would be protected from exposure to levels exceeding the ANSI guidelines, each of the other applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985), entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure To Radiofrequency Radiation," at 28.

21. Accordingly, these applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Furthermore, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See, Golden State Broadcasting Corp.,* 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See,* 47 C.F.R. § 1.1308(d).

22. *Site discrepancy.* An engineering review of AnnGie's application revealed a discrepancy between AnnGie's site elevation, as represented in its application, and as inferred from a reading of where the transmitter site has been plotted on its topographical site map. The ground elevation at AnnGie's site, as specified in Section V-B, Item 7(a)(1) of its application, is 539 meters (1767') AMSL. However, the elevation of the site at AnnGie's specified coordinates [33° 30' 37" NL, 117° 12' 37" WL] is approximately 518 meters (1700 feet) AMSL, as determined from its site map. We find that this site elevation discrepancy does not render AnnGie's application unacceptable for filing since the use of either value, 1767 feet/539 meters or 1700 feet/518 meters, would not cause the proposal to violate the maximum power/antenna height provisions of 47 C.F.R. § 73.211. Additionally, no other rule sections are violated by the site elevation inconsistencies. *See, FPS Broadcasting Group,* 3 FCC Rcd. 3716 (1988). However, we will require AnnGie to amend its application to eliminate the stated discrepancies within 30 days of the release of this Order. In addition, since data on file with the Federal Aviation Administration may be erroneous, an air hazard issue will be specified against this applicant.

23. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Spain	6/3/91
TVB	6/19/90
Kimler	8/2/90
AnnGie	10/16/90; 7/8/91
Rogers	9/10/90
TCLP	11/5/90

24. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

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[4] On September 10, 1990, Rogers filed an amendment "pursuant to § 1.65 of the Commission's Rules to show the proposed station's 3.16 mV/m and 1 mV/m predicted contours relative to the previously unknown legal boundaries of the principal community of Temecula." Her premise was that since the effective date of the incorporation of the City of Temecula was December 1, 1989, and that, according to a signed declaration dated August 27, 1990 by the Deputy City Clerk of Temecula, copies of the official Temecula map were not available for public distribution until "some time after January 1, 1990," it was reasonable that applicants for the Temecula station, whose window closed January 22, 1990, would submit non-uniform city boundaries.

25. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

26. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Spain, TVB, Kimler, Herron, AnnGie, Avid, Rogers, or TCLP in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the respective proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319, and, if not, to determine the effect thereof on the respective applicant's basic qualifications to be a Commission licensee.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by AnnGie would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

27. IT IS FURTHER ORDERED, That, pursuant to paragraph 2 hereinabove, the applications of New Town and MCI ARE HEREBY DISMISSED.

28. IT IS FURTHER ORDERED, That, pursuant to paragraph 3 hereinabove, the applications of Los Amigos, FM Data, TBI, Alexsii, Valley View, and B & M ARE HEREBY DISMISSED.

29. IT IS FURTHER ORDERED, That, pursuant to paragraph 11 hereinabove, Spain, AnnGie, Rogers, and TCLP must submit an amendment eliminating their short spacing to KTWV-FM or KIKF-FM, or both, to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division, respectively.

30. IT IS FURTHER ORDERED, That New Town's petition to deny the applications of Spain, AnnGie, Rogers, and TCLP IS HEREBY DENIED.

31. IT IS FURTHER ORDERED, That TCLP's petition to deny TBC's application IS GRANTED to the extent indicated herein, and TBC's application IS HEREBY DISMISSED.

32. IT IS FURTHER ORDERED, That, pursuant to paragraph 21 hereinabove, TCLP's petition to deny Rogers's application IS HEREBY DENIED.

33. IT IS FURTHER ORDERED, That in accordance with paragraph 22 hereinabove, Spain, TVB, Kimler, Herron, AnnGie, Avid, Rogers, and TCLP must submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

34. IT IS FURTHER ORDERED, That, pursuant to paragraphs 24 and 25 hereinabove, TCLP's informal objection IS HEREBY DENIED and AnnGie must submit an amendment eliminating the stated site elevation discrepancies to the presiding Administrative Law Judge within 30 days of the release of this Order.

35. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Spain, TVB, AnnGie, Rogers, Kimler and TCLP ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

36. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

37. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

38. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally, Proposals to Reform the Commission's Comparative Hearing Process* (*Report and Order* in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

39. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington DC 20554

PUBLIC NOTICE

Released: October 24, 1991

Advisory Committee on Advanced Television Service Implementation Subcommittee Meeting

November 19, 1991
10:00 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1 Policy and Regulation
4. Report of Working Party 2 Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237. George Vradenburg III at (213) 203-1334, or Gina Harrison at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CENTURY CELLUNET OF JACKSON MSA LIMITED PARTNERSHIP — File No. 02253-CL-L-89

For Authority to operate Station KNKA639 in the Domestic Public Cellular Radio Telecommunications Service operating on Frequency Block B to serve the Jackson, Michigan Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 1991; Released: November 1, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address an Application for Review filed by Jackson Cellular Inc. (JCI) requesting that the Commission reverse a Mobile Services Division (MSD) order[1] denying JCI's Petition for Deferral of Operating Authority and Motion for Order to Show Cause against Century Cellunet of Jackson MSA Limited Partnership (Century). For the reasons discussed below, we deny JCI's Application for Review.

II. BACKGROUND

2. On January 19, 1988, Century filed an FCC Form 489 notifying the Commission that Century had completed construction of the wireline cellular system in the Jackson, Michigan, Metropolitan Statistical Area (MSA). Century checked box A ([f]acilities have been constructed exactly in accordance with the authorization) and next to this box indicated "[n]ot for initial license" on FCC Form 489.[2] Operating authority was granted on January 20, 1988. On October 18, 1988, the MSD wrote to Century, stating that its initial Form 489 could not be found. In response, on November 1, 1988 Century alleged it had made a mistake in the previous filing and filed an amended FCC Form 489. Century checked box A ([f]acilities have been constructed exactly in accordance with the authorization) and next to this box indicated "[f]or initial license" on this amended FCC Form 489. Simultaneously, Century filed a Request for Special Temporary Authority (STA) to allow continued operation of the station.

3. JCI, the nonwireline tentative selectee in this market, filed a Petition to Defer requesting that Century not be allowed to provide service to the public for six months. JCI also filed a Motion for an Order to Show Cause requesting that Century's license be revoked. By letter dated December 1, 1988 the MSD granted Century an STA to provide service. The MSD later denied JCI's Petition to Defer and Motion for Order to Show Cause, affirmed the grant of the STA and granted Century operating authority. The MSD held that: (1) JCI had not proved that initiation of service by Century would be against the public interest; (2) Century had not misrepresented facts to the Commission which would warrant the initiation of a revocation proceeding and that a hearing was not necessary on the misrepresentation issue; and (3) grant of the STA was in the public interest.

4. In the Application for Review JCI argues that the MSD erred in finding that Century did not make a material misrepresentation. JCI maintains that there is a substantial and material question of fact requiring a hearing to determine whether Century's license should be revoked. According to JCI, the hearing should inquire into whether Century intentionally inserted the words "[n]ot for initial license" in the FCC Form 489, in order to circumvent the Commission's processes and provide service without giving parties the opportunity to file petitions to defer. JCI also maintains that the MSD erred as a matter of law in granting an STA to Century. JCI claims that Section 22.25(b) only provides authority for waiving public notice requirements, not for granting STAs.[3] In the alternative, JCI contends that assuming that Section 22.25(b) provides authority for granting STAs, Century failed to meet the requirements of Section 22.25(b)(4).[4] Finally, JCI alleges that the MSD erred in not granting headstart relief where the cause of JCI's inability to commence operations is the Commission's unwarranted delay in processing JCI's application. Century requests that the Application for Review be denied because the MSD decision was correct and properly followed Commission precedents.

III. DISCUSSION

A. Motion for Order to Show Cause

5. In ascertaining whether Century's "not for initial license" language in its FCC Form 489 raised questions of possible misrepresentation or lack of candor we look to see if there is any evidence showing an intent to deceive. Unless there is evidence showing "deceptive intent," we will not find that an intentional misrepresentation or that lack of candor has occurred. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). The "bare existence of a mistake" in an application, "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact." *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979). In reviewing the MSD's analysis, we look to the facts in the record.[5]

6. Century explained in detail how the language "[n]ot for initial license" came to appear in its Form 489. David E. Hogan (President of Century's general partner) explained that: (1) the language "[n]ot for initial license" was inadvertently carried over to the Jackson FCC Form 489 from three other Forms 489 for other markets that were drafted at the same time, (2) all four forms were reviewed and signed by Hogan at the same time but he forgot that Jackson and one other MSA market were exceptions to the "[n]ot for initial license" status, (3) Hogan wrongly assumed the initial Form 489 for Jackson had already been filed and he did not focus enough on the Jackson filing to realize the error, and (4) Century

only discovered the error when the MSD requested a date-of-receipt stamped copy of the initial Form 489 filing.[6]

7. The record does not contain any evidence to refute Century's explanation that it merely made a clerical mistake. JCI has attempted to establish by mere allegation that Century's error was part of an intentional plan to avoid the petition-to-defer process. Such "speculation is unsupported by any evidence tending to show an intent to deceive." *Riverside Broadcasting Co., Inc.*, 53 Rad. Reg. 2d 1154, 1157 (1983); *see also Fresno Cellular Telephone Company*, FCC 85-550 (released Oct. 17, 1985). We agree with the MSD that JCI has not offered adequate support for its allegation that Century intended to abuse our licensing process[7] or mislead the Commission, or that it intentionally planned to avoid the petition-to-defer process. Additionally, the MSD correctly found that JCI's failure to demonstrate any motive for deception on Century's part precluded the need for further inquiry into the possibility of an intentional misrepresentation or lack of candor on the part of Century. We find therefore, no error in the record to reverse the MSD's finding on the matter of misrepresentation or lack of candor.

8. Century's inadvertent error, while not to be condoned, does not justify license revocation as JCI suggests. Initiation of a revocation proceeding through an order to show cause, as permitted by Section 312(a),[8] "is, of course, wholly subject to our discretion." *Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978); *Salem Broadcasting*, 1 FCC 2d 655 (1965).[9] We concur with the MSD that initiation of revocation proceedings is not warranted in this case because there is no evidence of any intentional misrepresentation or lack of candor, or any action inconsistent with the public interest which would justify the exercise of our discretion to initiate a revocation proceeding under Section 312 of the Act. *See KNOK Broadcasting, Inc.*, 29 FCC 2d 47, 50 (1971).

9. Additionally, we disagree with JCI that the MSD was required to conduct a two step analysis under Section 309 and *Astroline Communications Ltd. Partnership v. FCC*, 857 F.2d 1556, 1557 (D.C. Cir. 1988) (*Astroline*), to determine whether a hearing should have been held concerning the misrepresentation issue. In the cellular service, an applicant files an FCC Form 401 for facilities authorization. This application falls under Section 309(d) of the Act and petitions to deny may be submitted.[10] Later an FCC Form 489 is required to be filed with the Commission to provide notification of completion of construction. Wireline cellular carriers filing an initial Form 489 cannot provide service to the public until any petitions to defer operating authority filed in response to the public notice of the Form 489 are resolved. This procedure was designed to offer nonwireline carriers the opportunity to raise headstart questions against the wireline licensee. *See Part 22 Rewrite, supra*, and *Cellular Communications Systems, supra*. *See also* note 1, *supra*. The case before us, however, does not involve an application for authorization; rather it involves notification of completion of construction subsequent to the grant of an authorization. Section 309(d) petitions to deny are not permitted to be filed in response to a notice of the filing of a Form 489. JCI's request for hearing in its Motion for an Order to Show Cause was under Section 312 of the Act, 47 U.S.C. §312. Therefore, an analysis under Section 309 of the Act and *Astroline* was unnecessary.[11] *See MCI Telecommunications, supra* note 5, at 515 n. 18.[12]

B. Special Temporary Authority

10. We find that the STA grant was proper and in accordance with Section 22.25(b)(4). Contrary to JCI's arguments, this section does give authority to grant STAs upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in such service would seriously prejudice the public interest. We agree with the MSD that under the circumstances in this case, it was in the public interest to grant an STA to Century to continue providing cellular service to the public. Indeed, to have required Century to cease operations at that time would have been detrimental to the public interest because subscribers, even if just a few as JCI contends, receiving cellular service would have been deprived of this existing service. In the past the Commission has granted special temporary authority under Section 309(f) and Section 22.25(b)(3) and (c) to prevent interruption in service. *See La Star Cellular Telephone Co.*, 5 FCC Rcd 3286, 3291 n.3 (1990), *aff'd*, 899 F. 2d 1233 (1990). *See also Man Corp.*, 39 RR 2d 748 (1976). *Compare, KDAB Inc.*, 52 RR 2d 201 (1982) (continued operations after reversal by court of Commission decision granting license and facilities have been operational for three years, is not inconsistent with the Communications Act and is necessary in the execution of Commission functions within the meaning of Section 4(i) of the Act).[13] We find no error in the record warranting reversal. In addition, we find that grant of the STA did not harm JCI, since as discussed below, we subsequently denied its petition to defer the initiation of wireline service.

C. Petition to Defer

11. A non-wireline selectee requesting a deferral of service bears a heavy burden of showing that such deferral would be in the public interest. *Cellular Communications Systems, supra* note 2, 86 FCC 2d at 491 n. 57. The initiation of service will only be postponed "[w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved." *Id.* at 492. No deferral of service will be granted longer than six months. *See Cellular Communications Systems, supra* note 2, 89 FCC 2d 58 at 75 n. 32 (1982).

12. JCI had the burden of establishing by specific and compelling evidence that early wireline entry would foreclose the development of a competitive cellular market. *See Chicago SMSA Limited Partnership*, 95 FCC 2d 538 (1983). *See also Eau Claire Cellular Telephone Company*, 3 FCC Rcd 3081 (Com. Car. Bur. 1988), and *Illinois SMSA Limited Partnership*, 3 FCC Rcd 6144 (Com. Car. Bur. 1988). JCI failed to make a showing that immediate service to the public by Century was harmful or that competition would be foreclosed. Further, JCI's failure to enter the Jackson MSA market as a reseller to offset any headstart advantage held by Century was a voluntary business decision on JCI's part and can not support JCI's argument that competition will be harmed unless wireline service is deferred. Moreover, we agree with the MSD's finding that JCI is not entitled to headstart relief merely because a grant of its application has been delayed by an investigation.[14] Therefore, we affirm the MSD's decision denying JCI's requested headstart relief.

IV. CONCLUSION

13. The MSD correctly concluded that there is no evidence that Century has misrepresented facts or lacked candor in its dealings with the Commission and properly denied JCI's Motion for Order to Show Cause. Additionally, the MSD correctly found that JCI had not made the showing necessary for a grant of a petition to defer. The MSD also correctly granted an STA and operating authority to Century. For these reasons we find that the MSD decision was correct and we affirm it.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED THAT the Application for Review filed by Jackson Cellular, Inc. IS DENIED.

15. IT IS FURTHER ORDERED THAT the Motion to Dismiss filed by Century Cellunet of Jackson MSA Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Century Cellunet of Jackson MSA Limited Partnership*, 4 FCC Rcd 3414 (Mob. Ser. Div. 1989).

[2] When a cellular system is ready to commence operation, FCC Form 489 (Notification of Status of Facilities under Part 22 of FCC Rules) must be filed with the Commission. *See* Revision and Update of Part 22 of the Public Mobile Radio Service Rules, 95 FCC 2d 769 (1983) (*Part 22 Rewrite*), *recon*, 101 FCC 2d 799 (1985), *further recon*, 2 FCC Rcd 1798 (1987). A nonwireline licensee upon filing FCC Form 489 should immediately begin providing service. A wireline licensee upon filing an initial FCC Form 489, must wait 14 days after Public Notice of the filing before it begins providing service to the public. *See* Public Notice, Rpt. No. CL-88-118 (June 2, 1988). During this time frame the nonwireline can request a brief moratorium on the initiation of service by the wireline. Because of the possibility of early entry by the wireline carrier into a market, or "headstart", the Commission provided that the nonwireline could request a brief moratorium on the initiation of service by the wireline. *See* Cellular Communications Systems, 86 FCC 2d 469, 491 n.57 (1981), *modified*, 89 FCC 2d 58, 75 n.32 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub. nom.*, United States v. FCC, No. 82-1526 (D.C. Cir. 1983).

[3] Section 22.25(b) in part provides that: "special temporary authorizations may be granted without regard to the 30-day public notice requirements of § 22.27(b) . . . ."

[4] Section 22.25(b)(4) provides:

> The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of service would seriously prejudice the public interest.

[5] Although we are affirming the MSD decision, we also find that petitions to revoke filed by third parties are not cognizable under the Communications Act or our rules. Consistent with prior decisions and practice, the MSD should have treated the JCI Motion for Order to Show Cause as an informal request for action under Section 1.41 of the rules, 47 C.F.R. Section 1.41. *See* MCI Telecommunications Corp., 3 FCC Rcd 509, 514 n. 1 (1988), *supplemental order*, 4 FCC Rcd 7299 (1988), *appeal dismissed sub nom.* Telestar Inc. v FCC, 901 F.2d 1131 (D.C. Cir. 1990) (table); KSDK, Inc., 93 FCC 2d 893 (1983).

[6] Century's Opposition to Application for Review, Attachment A. Century's Opposition to Motion for Show Cause Order, Attachment A. In opposing the application for review, Century also explained that it was operating under the mistaken assumption that the Jackson system had already been through the petition-to-defer process and, thus, Century was not necessarily expecting the Form 489 to appear on public notice.

[7] We agree with the MSD's finding that the rules do not require Century to serve a copy of its Form 489 on JCI. JCI argued that the lack of service showed an intent to deceive.

[8] Section 312(a) of the Communications Act states that we "may" revoke a station license for, *inter alia*, "false statements knowingly made" to the Commission, conditions coming to our attention that would warrant denial of an initial application, "willful or repeated failure to operate substantially as set forth in the license," or "willful or repeated violation" of the Communications Act or our rules. 47 U.S.C. Section 312(a).

[9] We have discretion, after considering allegations of noncompliance with our rules, even *prima facie* evidence of violations, to determine not to issue orders to show cause. *Tulsa*, *supra* at 877. For instance, we can refuse to issue an order to show cause based upon the petition of a third party even if it is determined that a violation of Commission rules exists. *See* Humboldt Bay Video Co., 56 FCC 2d 68, 71 n. 9 (1975). Additionally, when a violation has been shown under Section 312(b) we may impose a lesser sanction. *See* C.J. Community Services, Inc. v. FCC, 246 F.2d 664 (D.C. Cir. 1957). *See also*, MCI Telecommunications, *supra* note 5.

[10] The MSD correctly cited the law and precedents for hearing requests involving applications for authorizations under Section 309 (a) of the Act. Section 309(a) of the Act directs the Commission to grant common carrier applications when, "upon examination of such application and upon consideration of such other matters as the Commission may officially notice, [it] shall find that public interest, convenience, and necessity would be served by the granting thereof." 47 U.S.C. §309(a). The statute provides for evidentiary hearings if there is a material question of fact to be resolved. Parties challenging an application by means of a petition to deny and who seek a hearing thereon must satisfy a two-step test established in 47 U.S.C. §§ 309(d)(1) and (2). *See Astroline*, *supra* at 1557.

[11] *See e.g.*, Chesapeake-Portsmouth Broadcasting Corp., 32 RR 2d 1179 (1975); WWIE Inc., 37 RR 2d 1378 (1976) (application for license to cover construction permit should be designated for hearing under Section 319 (c) rather than 309(e) of the Communications Act).

[12] In contrast to the Section 312(a) standard, under Section 309(e) we are required to designate for hearing an application for an initial authorization or for renewal if there is a "substantial and material question of fact" raised with respect to whether grant of the application would serve the public interest, convenience and necessity. *See* MCI Telecommunications, *supra* note 5, at 515 n. 18. *See also* Astroline, *supra* at 1557. We note, however, that the MSD's analysis under Section 309 was correct, and that no substantial and material questions of fact have been raised that would require a hearing.

[13] We endorse the MSD's statement that a grant of an STA in this case does not signal that we will generally grant STAs where licensees seek to cure a licensing defect by filing an STA request. The MSD correctly pointed out that its STA merely allowed Century to continue to provide service to the public until we could resolve the pending petitions.

[14] The Crossville investigation was initiated by the Commission regarding a cellular application preparer in Crossville, Tennessee. JCI's application appeared to have been prepared by the same application preparer. The investigation focused on possible fraudulent violations-and, thus, disqualifying factors-occurring during the application process concerning a number of applications. The Crossville investigation is still pending.

Subsequent to the *MSD Order* and the instant pleading cycle, the MSD dismissed JCI's cellular application for the Jackson MSA for failing to have reasonable assurance of site availability for its proposed cell. *See Roberts Cellular Inc., et al.*, 5 FCC Rcd 1357 (Mob. Serv. Div. 1990), *petition for reconsideration pending*. *See also Eldon L. Huberd/b/a Cellutech*, DA 91-142 (Mob. Ser. Div. February 8, 1991). As a result, Century filed a Motion to Dismiss JCI's Application for Review, alleging that JCI lacks standing. JCI continues to have standing in this proceeding because it has filed a petition for reconsideration of the dismissal of its application. Therefore, Century's Motion to Dismiss is denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application	File Nos.
of Eastern Carolina Broadcasting	BR-880801UB and
Company, Inc., Former Licensee[1]	BRH-880801YB
of Stations WGBR(AM)/WKTC(FM)[2]	
Goldsboro, North Carolina	

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1991; Released: October 28, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration a Petition for Reconsideration filed March 20, 1989 by Eastern Carolina Broadcasting Company, Liquidating Trust (Eastern Carolina). The petitioner requests that the Commission reconsider its decision in a By Direction Letter and Notice of Apparent Liability For Forfeiture (*Letter*) released February 16, 1989, *Eastern Carolina Broadcasting Company, Inc.*, 4 FCC Rcd 1621 (1989) in which we concluded that the licensee's failure to comply with the Commission's affirmative action rules warranted reporting conditions, a forfeiture of $7,000 and a short term renewal of license. *See* 47 C.F.R. Section 73.2080(b)(3), (b)(5), (c)(3) and (c)(5). In its petition, the licensee requests that the Commission eliminate the forfeiture and grant renewal of the license for a full term.

II. BACKGROUND

2. The *Letter* sets out the stations' record of inadequate EEO efforts. Review of the licensee's renewal application and response to our inquiry revealed that it failed to recruit minorities and to self-assess its EEO program for at least the last three years of the license term. Specifically, we found that the licensee made only sporadic efforts "to apprise potential sources of Black applicants when full-time positions were available." The licensee could document neither the composition of the applicant pools for each vacancy nor the recruitment sources contacted for each vacancy. Minority applicants whose race was known were, with only two exceptions, listed as unsolicited or referral source unknown. The licensee hired four minorities out of 16 full-time hires during the last year of the license term, two of whom were not hired until after the renewal application was filed. From 1985 through 1987, the licensee hired no minorities during 46 hiring opportunities. In fact, the licensee hired no minorities from 1985 through May 1988, three months before filing its renewal application. In addition, the licensee did nothing to alter its EEO program despite the fact that in an area that was 30.4% minority, including 29% Black, the number of minority employees at its station declined from four (23.5%) overall and three (21.4%) upper-level in 1981 to one (4.3%) overall and zero upper-level in 1987.

3. In support of its request for reconsideration, Eastern Carolina puts forth several arguments. First, it argues that it employed numerous Black employees during the license term and that its contacts with recruitment sources likely to refer Black applicants were not sporadic as described in our *Letter*, but were periodic--twice a year--and complied with the Commission's EEO Rule. Eastern Carolina states that such periodic contact was "consistent with the commitment made in the Company's EEO program which was approved and passed on by the Commission in 1981." It goes on to explain that it is hard for a small market station to do a costly mass mailing and hold a job open for 30 days every time an opening occurs and to expect such a station to do so is "inconsistent with the Commission's past EEO practice in reviewing EEO performance of broadcast stations and with reality." It argues that neither the present EEO Rule nor the previous one requires that a licensee contact recruitment sources every time a vacancy occurs. It further states that such a requirement would be beyond the power granted to the Commission by the Communications Act.

4. Second, Eastern Carolina argues that the Commission's decision to impose a forfeiture on its stations was "arbitrary and capricious because it failed to recognize and analyze Eastern Carolina's performance under the different legal standards applicable at different times during the license term." In 1987, the Commission announced that it was refining its focus from results to efforts when analyzing stations' EEO programs. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*petition for reconsideration pending*) (*EEO Report and Order*). The licensee states that this new legal standard of analysis should not have been used to evaluate Eastern Carolina's entire license term when this new standard only came into effect a year before its stations' license term expired. Moreover, it states that during the last year of the license term, it attempted to comply with the new standard by sending letters to minority referral sources and by hiring a minority.

5. Third, the former licensee argues that no distinction exists between the EEO record of its stations which received reporting conditions, a $7,000 forfeiture and a short term license renewal and the EEO record of a group of stations on which the Commission imposed only reporting conditions. These stations include Station WLPB-TV, Baton Rouge Louisiana; Station WYES-TV, New Orleans, Louisiana; Station WNCT-TV, Greenville, North Carolina; Station WXEL-TV, West Palm Beach, Florida; Station WFBR(AM), Baltimore, Maryland; and Station KOKI-TV, Tulsa, Oklahoma.[3]

6. The final argument that the former licensee puts forth is that the Notice of Apparent Liability against its stations is deficient because it fails to set forth the exact date or dates of the former licensee's alleged violations of the EEO Rule as required by Section 503(b)(4) of the Communications Act, as amended, 47 U.S.C. Section 503(b)(4).

III. DISCUSSION

7. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). 47 C.F.R. Section 1.106(c). Applying this standard, reconsideration of the *Letter* is not appropriate as discussed below. We shall, however, address the former licensee's arguments to clarify the record.

8. Eastern Carolina's contentions stem from its assumption that the Commission changed its standard of reviewing EEO programs and that the sanction imposed was too harsh in light of the change. We disagree. The former licensee is incorrect when it states that the Commission held its stations to a new legal standard that was only announced a year before these stations' licenses expired. The *EEO Report and Order* did not announce a new legal standard or new obligation on broadcasters. Rather, it simply announced that the Commission was giving a greater emphasis to an obligation that had existed since 1970, specifically "that broadcast licensees refrain from employment discrimination and establish and maintain an affirmative action program for qualified women and minorities." 47 C.F.R. Section 73.2080 *cited in NAB Report and Order*, 4 FCC Rcd 1715, 1715 (1989) (request for clarification of the *EEO Report and Order* by the National Association of Broadcasters). In any event we have "focused our compliance review activities in both noncontested and contested cases -not only upon statistical data but also the efforts undertaken by the licensee to recruit and employ minorities and women." *In the Matter of Nondiscrimination in Employment Polices and Practices of Broadcast Licensees*, 60 FCC 2d 226, 229 (1976).

9. Further, Eastern Carolina fails to show any material error or omission in the *Letter*. The former licensee is incorrect when it states that the Commission acted in an arbitrary and capricious manner in concluding that its good faith efforts were inadequate. First, with respect to the instant case, the Commission never sanctioned biannual contacts of referral sources as Eastern Carolina suggests. The program submitted as part of the 1981 renewal application listed recruitment sources -- not a proposal of when sources would be contacted. Second, as a general matter, the Commission has required licensees to maintain a program affording equal opportunity in employment since 1970. *See Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970). The Commission's EEO Rule, as enunciated prior to the 1987 *EEO Report and Order*, states that licensees should maintain an affirmative action program for women and minorities, conduct review of its employment practices and adopt positive recruitment and other measures needed in order to ensure genuine equality of opportunity for women and minorities to participate fully in all occupations and levels of responsibility in the station. *See* 47 C.F.R. Section 73.2080(a), (b)(2), (b)(3), (b)(5). Eastern Carolina violated the EEO rule because its recruitment method was not adequate when it came to seeking and obtaining qualified minority applicants and it took no steps to remedy its shortcomings until renewal time.[4] The evidence originally presented by Eastern Carolina indicated that it failed to pursue an affirmative action program for at least three years of the license term from 1985 through May 1988.[5]

10. Next, Eastern Carolina presents no new evidence to support its contention that its EEO record does not warrant the sanctions imposed. In our *Letter*, we noted that Eastern Carolina had an unexplained and unaddressed decline in the minority workforce at its stations from 1981 through 1987; that it made only sporadic efforts to apprise potential sources of Black applicants when positions were available; that it kept incomplete EEO records; and that, although it hired four minorities in the reporting year, from 1985 through May 1988, the licensee hired no minorities despite a significant number of hiring opportunities. On review, Eastern Carolina contends that the sanctions imposed on its stations were contrary to Commission precedent.

11. In particular, Eastern Carolina maintains that review of precedent prior to the instant case reflects no cases in which the Commission imposed a forfeiture where the licensee employed minorities in full-time upper-level positions during the license term and solicited referral sources. It states that *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866 (1988) (*Kansas*), was distinguishable because the licensee in that case did not solicit any minority referrals. The Commission recognized that the EEO record of the licensee in *Kansas* was more egregious than the EEO record of Eastern Carolina and accordingly imposed a $10,000 forfeiture, whereas it only imposed a $7,000 forfeiture on Eastern Carolina. However, the overall record of Eastern Carolina was more egregious than the overall records of the stations it cites that received only reporting conditions. The former licensee inappropriately focuses on limited aspects of the EEO records of Stations WGBR, WLPB, WYES, WNCT, WXEL, WFBR, and KOKI, rather than studying the records as a whole.[6] When evaluating a station's EEO efforts, the Commission considers the totality of the circumstances. Contrary to its contentions, Eastern Carolina's EEO efforts and those of the other cited stations differed significantly, thus warranting different sanctions and remedies. Both Station WLPB and Station WFBR were located in areas with smaller Black labor forces than Stations WGBR(AM)/WKTC(FM), and, unlike the Goldsboro stations, had no decline in their minority workforces. Nothing in the Commission's descriptions of stations WYES, WNCT, and WXEL indicates that their contact with recruitment sources was sporadic. Finally, the licensee of Station KOKI appeared to make adequate efforts to recruit minorities throughout the license term, except during the reporting year, whereas the licensee of stations WGBR(AM)/WKTC(FM) did not appear to make adequate efforts to recruit minorities until the reporting year.

12. Finally, the former licensee mischaracterizes Section 503(b) of the Communications Act, 47 U.S.C. Section 503(b). The former licensee's actions constitute a continuing violation of the Commission's Rules, each day of which is considered a separate offense. 47 U.S.C. Section 503(b)(2). The *Letter* specified that it was the decline in the number of Black employees between 1981 and 1987 and the absence of minority hires and EEO efforts from 1985 through 1987 that showed a substantial lack of attention to the licensee's affirmative action responsibilities. Because the violations occurred throughout the years specified (i.e., every day) we believe that the NAL complied with the requirement that the date(s) of the conduct

be provided. *See In re Liability of WROV Broadcasters, Inc., Licensee of Station WROV (AM), Roanoke, VA for Forfeiture*, 6 FCC Rcd 1421, 1422 (1991).

IV. CONCLUSION

13. We note that the factors which the Commission takes into account when determining the amount of a forfeiture penalty include the nature, circumstances, extent and gravity of the violations and, with regard to the violator, the degree of culpability, any history of prior offenses, ability to pay and such other matters as justice may require. 47 C.F.R. Section 1.80(b)(3). After consideration of all these factors and taking into account the arguments put forth in the licensee's petition, as addressed above, we find the original *Letter* imposing a forfeiture of $7,000, short term renewal, and reporting conditions is appropriate.

V. ORDERING CLAUSES

14. Accordingly, *IT IS ORDERED*, that the Petition for Reconsideration and to Set Aside Forfeiture *IS DENIED*, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Eastern Carolina Broadcasting Company, Inc. *FORFEIT* to the United States the sum of seven thousand dollars ($7,000) for failing to comply with the Commission's Affirmative Action provisions. 47 C.F.R. Sections 73.2080(b)(3), (b)(5), (c)(3) and (c)(5). Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The assignment of the licenses of Stations WGBR(AM)/WKTC(FM) from Eastern Carolina Broadcasting Company, Inc. to Eastern Carolina Broadcasting Company, Liquidating Trust was granted on December 27, 1988. The assignment of the licenses of Stations WGBR(AM)/WKTC(FM) from Eastern Carolina Broadcasting Company, Liquidating Trust to New Age Communications Limited Partnership was granted on February 15, 1989.

[2] WGBR(FM) changed its call letters to WKTC(FM) on February 28, 1989.

[3] *See Station WLPB-TV and Station WYES-TV*, 3 FCC Rcd 1923 (1988); *Station* WNCT-TV, 3 FCC Rcd 1907 (1988); *Staton WXEL-TV*, 3 FCC Rcd 1930 (1988); *Station WFBR(AM)*, 3 FCC Rcd 5913 (1988); *Station KOKI-TV*, 4 FCC Rcd 2067 (1989).

[4] Even if the Commission had looked only at results when analyzing an EEO program prior to 1987, Eastern Carolina's EEO program would have been inadequate. Its minority workforce declined significantly from 1981 and 1987 and, despite a significant number of hiring opportunities between 1985 and May 1988, it hired no minorities.

[5] Eastern Carolina quotes the *NAB Report and Order* as stating that where a licensee cannot provide all the specific information requested by the Commission, an appropriate sanction would be one year of reporting conditions. *NAB Report and Order, supra*, at n.22. The former licensee goes on to argue that because "the Commission bemoaned Eastern Carolina's lack of records" and went on to impose a forfeiture and short term renewal, its decision was arbitrary and capricious. The former licensee ignores the fact that failing to keep adequate records of its EEO efforts was just one of the many reasons cited that the Commission sanctioned Eastern Carolina. Thus, sanctions greater than reporting conditions were warranted.

[6] We disagree with Eastern Carolina that the Commission failed to apply a consistent standard of review and therefore should reconsider the decision in this case, renew the stations for a full term and remove the $7,000 forfeiture. As we stated in *In the Matter of License Renewal Application of Congaree Broadcasters, Inc., For Station WSCQ-FM West Columbia, South Carolina*, 5 FCC Rcd 7691 (1990) n.6, in all our decisions, "we focus on the licensee's efforts to recruit, employ and promote women *and* minorities and the licensee's ongoing assessment of its EEO efforts." Factors that we consider in our analysis "include, but are not limited to, the EEO renewal program, the number of full-time hiring opportunities and the efforts made to fill those vacancies, documentation of those efforts, the licensee's assessment of those efforts, the length of the licensee's tenure and the employment profile during the license term." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Contel Telephone Companies

ORDER

Adopted: October 4, 1991; Released: October 10, 1991

By the Chief, Common Carrier Bureau:

1. On July 24, 1991, the GTE Service Corporation (GTE), on behalf of its affiliated Contel Telephone Companies (Contel), filed a petition for waiver of the Commission's equal access rules to permit Contel to engage in modified procedures for notifying customers in four end offices being converted from an alternative equal access technology (LEAS) to a full equal access technology. On August 23, 1991, the United States Telephone Association (USTA) and US Sprint (Sprint) filed comments in support of GTE's petition.

2. Contel instituted alternative equal access arrangements in 1988 because full equal access capability was not available in some Contel central offices. It advised the Commission that the LEAS system would be phased out and eventually replaced with a full equal access system. In March 1989, the Bureau granted Contel's waiver to permit an alternative access arrangement under the condition that Contel would reballot affected customers when full equal access was provided.[1]

3. In its waiver petition, GTE states that Contel is now preparing to implement a full capacity equal access system in four end offices that will allow 10XXX calling from those offices. GTE Petition at 2. Contel proposes to notify end users in these offices by direct mail of the additional calling capabilities available upon conversion to the new digital switching technology. *Id.* at 2. GTE argues that because end users have already chosen an equal access interexchange carrier (IXC) Contel should not be required to reballot those customers. It argues that such reballoting will be both confusing and costly. *Id.* at 3. GTE also states that Contel will advise customers by letter that they have the opportunity to change IXCs for 30 days after cutover of the end offices to equal access. GTE Reply at 2.

4. The Common Carrier Bureau has reviewed the petition and the comments filed by USTA and Sprint. We have concluded that grant of the waiver will avoid customer confusion and that consumer interest will be adequately protected by Contel's notification to its customers that they have a right to change IXCs for a limited period of time. We therefore conclude that the public interest would be served by a grant of GTE's waiver petition.

5. Accordingly, IT IS ORDERED that the petition for waiver filed by the GTE Service Corporation, on behalf of its affiliated Contel Telephone Companies, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] *See* Contel Service Corporation, CC Docket No. 88-287, *Memorandum Opinion and Order*, 4 FCC Rcd 2565 (Com. Car. Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-6

In the Matter of

Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1991; Released: October 18, 1991

Comment Date: December 16, 1991
Reply Comment Date: January 13, 1992

By the Commission:

I. INTRODUCTION

1. We sought comments on proposed rules for the acceptance, processing and selection of applications for the unserved areas of the country in the Cellular Radio Service. *See Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to Modify other cellular rules, (Notice of Proposed Rule Making)*, 5 FCC Rcd 1044 (1990) (NPRM). In response to the comments received, we have decided to seek further comments on a number of issues.[1] We are also proposing to amend various rules which apply to all cellular applications.

II. CONTOURS

2. In the NPRM, we proposed that existing Cellular Geographic Service Areas (CGSAs) of current licensees be made coterminous with 39 dBu contours, which we proposed as the practial boundaries of the reliable service area for cellular systems.[2] Current Section 22.903 of the rules only requires that the combined 39 dBu contours of all base stations must cover at least 75% of the total CGSA; [3] that a carrier cover 75% of the land area or population of the Metropolitan Statistical Area (MSA) for markets below the top 90; and that, for Rural Service Areas (RSAs), the combined 39 dBu contours of all base stations must cover at least 75% of the total CGSA. We also requested comments on two options for modifying authorized CGSAs: (1) through the Rule Making proceeding, to modify CGSAs in existence at the end of the five-year fill-in period; and (2) modification to become effective at the first renewal period of the license. This change of service area definition was proposed because it is not in the public interest for cellular carriers to protect areas where service was in fact not being provided to the public simply because they had designated an area as part of a CGSA.

3. The comments to the NPRM almost unanimously objected to the use of Carey as the method for determining signal strength or propagation.[4] They maintain that it is improper to presume that the served area is within the Carey predicted 39 dBu contours and the unserved area is outside of those contours. The commenters maintain that customers receive reliable service in areas that are not within 39 dBu contours. The commenters argue that by redefining the CGSA as being coextensive with 39 dBu contours, the Commission would place undue reliance on Carey contours, underestimate actual service by licensees, create substantial interference problems between contiguous systems and impede the development of existing systems because effective coverage from abutting systems would substantially overlap, thereby precluding efficient operation of cellular systems.[5] Additionally, they argue that the Commission lacks legal authority to modify cellular authorizations *en masse* through a Rule Making proceeding during the terms of those authorizations.

4. The commenters recommended that real world propagation characteristics be recognized in defining existing service areas.[6] As alternatives, the commenters recommend that the authorized service areas of current licensees be limited to the area within each of the 39 dBu contours of the system, plus a 3 to 5 mile buffer zone; or use of 32 dBu as a more reliable predictive model. Additionally, the commenters suggest that CGSAs be based on actual RF coverage, and that the Commission allow carriers to submit alternative propagation studies to define CGSAs and file new CGSA maps to reflect the actual contour coverage. Another recommendation was to allow existing licensees to define their CGSAs at their discretion, at a percentage greater than the composite 39 dBu contours, at the end of the five-year fill-in period. Another recommendation was that the Commission should create a rebuttable presumption that, based upon field measurements certified as accurate by a licensed professional engineer, a licensee's service area should be protected beyond the 39 dBu contour but no more than the 25 dBu contour.

5. After careful consideration of the arguments advanced by the commenting parties, we have been persuaded that we should not make CGSAs coterminous with the composite outer boundary of the predicted 39 dBu contours as proposed. It is clear that many of the commenting parties, including some with years of field experience with cellular system coverage, believe that reliable cellular service is regularly provided beyond the point where the median field strength drops below 39 dBu.

6. We reiterate that our primary goal is for good quality cellular service to be provided to the public as expeditiously as possible and on a nationwide basis. Our objective in this proceeding is to adopt a methodology which will identify areas where cellular service is not actually being provided. The lack of service could be because the Commission has not yet authorized service in the area or because the authorized carriers have apparently decided not to serve the areas. Pursuant to this Further Notice, we intend to establish policies and procedures which will encourage carriers to serve all areas.

7. We remain convinced that there may be areas within CGSAs which remain unserved. Additionally, we continue to believe that we have authority to modify CGSAs

as part of a Rule Making proceeding.[7] Therefore, we are proposing to adopt a new method for establishing the boundary of the CGSA, for all existing and new systems. As a result, we will modify the CGSAs of existing licensees to be coterminous to the contours as defined using our new formula. We again request comments as to whether the effective date of such a rule change should be (1) at the end of a carrier's five-year fill-in period; (2) one year after the effective date of this Rule Making proceeding; (3) at first license renewal of the licensee in question. The reason for these proposed effective dates is to afford licensees notice of the action and an opportunity to expand their service areas within their CGSAs to serve fully customers within the CGSA boundary. *See NPRM*, 5 FCC Rcd 1044 (1990).

8. We believe it is not necessary, given the expense and the substantial length of time it would take, to develop a new propagation model for 800 MHz in order to accomplish our objective in this proceeding. In addition, we do not agree with BellSouth that we need to rely exclusively on competitive economic considerations or establish rebuttable presumptions based on actual propagation. We believe we need to maintain the concept of CGSAs because this facilitates our cellular licensing process while providing carriers flexibility in system design. We tentatively conclude that new CGSA boundaries should be defined and existing CGSA boundaries adjusted in such a way that they more closely approximate the extent of reliable service actually provided by the cellular systems. We can now rely on the expertise of the industry to determine actual reliable service areas and, thus, to eliminate the interim measure the Commission had adopted at the inception of cellular service. We believe the growth of the cellular industry justifies revisiting this matter.

9. We propose that CGSAs be defined as that area within the composite outer reliable service area boundaries of the individual cells, calculated by the following formula:

$$d = 1.05 \times H^{0.34} \times P^{0.17}$$

Where d is the distance from the cell site antenna to the reliable service area boundary in miles; H is the antenna height above average terrain in feet; and P is the effective radiated power (ERP) in Watts. This formula approximates the distance to the 32 dBu contour predicted by Carey.[8] We believe the 32 dBu field strength is close to the minimum required for reliable cellular service. However, if the record developed in this proceeding suggests that a different standard would be more appropriate, the constant-factor 1.05 could be changed to approximate other median field strengths.[9] This formula is merely an administrative tool designed to facilitate application processing and is not meant as the most accurate theoretical model.[10] We request comments on this formula, particularly on whether the constant factor should be adjusted. We also invite suggestions for on any other refinements to this proposed formula or any other method(s) which may further our objective of establishing a realistic estimate of actual reliable service coverage, keeping in mind that the methodology should be simple, objective and consistent.

10. We also request comment on alternative ways to reliably define with relative administrative certainty what a reliable service area is. For instance, a computer program created by LCC, Inc. is widely used by the industry to predict for cellular carriers' own internal purposes what reliable service areas are. It is possible that such a program would also be suitable for use in creating a Commission definition of a reliable service area. In addition, another alternative might be to require that cellular carriers conduct field measurements at the outer boundary of their service territory to determine, on an average basis during normal weather conditions, whether there exists in a particular area a minimum signal strength necessary to permit a customer to make and receive a cellular call. This latter alternative has the disadvantage of being costly to measure and subject to litigation because the field strength tests could be challenged. We request comment on all of these proposals, including any other proposal which interested parties believe will serve as a reasonable measurement of where reliable cellular service is being provided to the public. We also request comment on whether the Commission should adopt one mandatory standard, or whether we should provide cellular licensees with a number of different alternatives, each of which could be used in setting a CGSA to encompass a reliable service area.[12]

III. WATER AREAS

A. Gulf of Mexico

11. Several of the commenting parties have raised issues with respect to the Commission's original proposal to draw back CGSAs to 39 dBu contours and how that proposal would apply to water areas. Although we have proposed in this Further Notice to modify that proposal, the issue remains how to apply coverage requirements over large bodies of water. The Commission has had occasion to determine licensing policies in the Gulf of Mexico when it created the Gulf of Mexico Statistical Area (GMSA). *See Petroleum Communications, Inc.*, FCC 83-434 (October 7, 1983), *recon.*, Mimeo No. 6337 (Com. Car. Bur. August 14, 1985), *recon. denied*, 1 FCC Rcd 511 (1986). *See also Petroleum Communications, Inc.*, 3 FCC Rcd 399 (Mob. Ser. Div. 1988), *recon. denied*, 4 FCC Rcd 4085 (Com. Car. Bur. 1989). At present, unlike other MSA licensees, GMSA carriers are not required to cover 75 percent of their CGSAs with 39 dBu contours. The Gulf has been treated differently in large part because there are no permanent population centers in the Gulf, with service being provided largely to offshore oil rigs and boating traffic. Also, propagation characteristics over water are different than for land based systems. Another reason for different treatment of Gulf cellular systems has been the inability of Gulf carriers to locate antenna towers on land to serve gulf areas because of the potential for interference caused to land systems. One GMSA carrier now claims the entire Gulf as its CGSA and the other GMSA carrier has filed an application that would accomplish the same result.

12. However, we believe that, as with other cellular carriers it is not in the public interest for GMSA carriers to protect areas where service is in fact not being provided to the public simply because they had designated an area as part of a CGSA. Therefore, we tentatively conclude that Gulf carriers should pull back their CGSAs to be coterminous with their reliable service area. *See* paras. 7 and 10 *supra*. We propose that CGSAs in the GMSA be defined as that area within the composite outer reliable service area boundaries of the individual cells calculated by the following formula:

$$d = 1.65 \times H^{0.3} \times P^{0.15}$$

where d is the distance from the cell site antenna to the reliable service area boundary in miles; h is the antenna height above average terrain in feet; and p is the effective radiated power (ERP) in Watts. This formula is derived from the field strength predictions over sea water contained in Bullington [13] and approximates the distance to the 32 dBu median field strength contour over sea water.[14] We request comments on this proposal. As we stated in paragraph 9, above, we also invite comments on any other method(s) which may further our objective of establishing a realistic estimate of actual reliable service coverage, keeping in mind that the methodology should be simple, objective and consistent.[15] We also ask for comments whether Gulf carriers should be treated the same as or different from other cellular licensees in redrawing CGSAs.

B. Other Water Areas

13. Parties commenting on the NPRM also questioned whether bodies of water other than the Gulf of Mexico should be included in a carrier's CGSA. The Commission has not had much occasion to address treatment of non-Gulf water areas, such as service into bays and oceans or over large bodies of water which are between two markets. The only clear pronouncement has been that MSA carriers could not use a 39 dBu contour extending into an ocean in calculating 75 percent coverage requriements. *Advanced Mobile Phone Service, Inc.*, 54 Rad. Reg. 2d (P&F) 260 (1985) (Miami Order).

14. In general, and for non-Gulf territories, bodies of water in whole or in part located within a county boundary should be included in the market which contains that county. We are aware that many carriers have 39 dBu contours which extend into the ocean or water areas from land-based transmitters. Because the propagation characteristics across water are somewhat unpredictable, and are more extensive than contours over land areas, it is clear that even the proposals for defining reliable service areas proposed in this Further Notice may not adequately identify reliable service areas over water. We request comment on what should be the appropriate measurement over water areas.

15. There have already arisen some disputes between existing licensees and unserved area applicants who filed prematurely, over whether a water area was unserved. We recognize that there are no explicit rules governing whether coverage over a water area is included or excluded from an existing licensee's CGSA. We also recognize that we have granted many authorizations for cell cites which have 39 dBu contours which extend over water areas from land-based transmitters. *See e.g., Rural Cellular Service, (Third Order on Reconsideration)*, 3 FCC Rcd 4403 (1988) (permitted 39 dBu extensions over water where such water is not part of another RSA, MSA, NECMA or the Gulf of Mexico). In addition, cellular is primarily a land-based service. Notwithstanding, with the explosion in cellular demand, cellular service is as useful to customers travelling over water as it is over land. Given all of these factors, we propose to include in existing licensee's CGSAs water areas if reliable service is provided to the public in those water areas. The market boundary will be governed by county lines, if such exist, or by artificial lines running into the water area perpendicular to the coast line. Unserved area applications will not be accepted for these water areas in which reliable service is being provided. We believe this policy strikes a fair balance between existing service providers and potential new applicants. Until the conclusion of this Further Notice, no unserved area applications will be accepted which propose service solely for any water areas. In any event, we do not anticipate granting any licenses for transmitters located outside the territorial lands or waters of the United States. In addition, provision of service over water near international borders will be governed by established coordination procedures between the United States and the neighboring foreign country. We request comment on these proposals and any alternatives which would serve the public interest.

IV. MODIFICATION APPLICATIONS

16. McCaw requests certain changes so that modification applications by existing licensees are expeditiously processed because Commission resources will reach their limits by processing unserved area applications. McCaw suggests that modification application processing could be further expedited by adopting a policy making the CGSA coextensive with the MSA or RSA during the fill-in period so that existing licensees could expand their service territories by using Form 489 instead of Form 401 in all cases where the extension did not propose a *de minimis* extension into another RSA or MSA.[16]

17. We tentatively conclude that this is a good recommendation and we seek comment on the proposal. We propose that during the five-year fill-in period, licensees be allowed to file fill-in applications using Form 489 instead of Form 401 and the licensees be able to construct facilities withour prior Commission approval. We tentatively find that this would expedite processing of modification applications while, at the same time, promoting the public interest by providing service to the public expeditiously. The process would be expedited because these filings would not be placed on public notice for 30 days, petitions to deny could not be filed and the licensee could construct the facilities without prior Commission approval. Moreover, Commission resources would be conserved. This proposal would not apply when the licensee proposed a *de minimis* 39 dBu contour extension into another RSA or MSA that had not been combined. These latter applications must be filed on Form 401, will be placed on public notice, and we will analyze whether the extension is in fact *de minimis*.

V. WITHDRAWAL OF APPLICATIONS/PLEADINGS

18. McCaw also recommends that the Commission adopt additional procedures specifically designed to prevent speculation, similar to those adopted recently in the broadcast renewal process. *See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 4780 (1989), *recon.*, 5 FCC Rcd 3911 (1990). This would include limiting the consideration that an applicant or a party can receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

19. We believe this recommendation has merit. For instance, parties may file petitions to deny just to extract money from the applicant or to delay the applicant and thus force a settlement. To the extent petitions are filed

for private financial gain, the public interest is not served. This burdens applicants and the public and wastes Commission resources. Therefore, we tentatively conclude that the public interest is served by adoption of rules that reduce the incentives and potential for such abuse. Accordingly, we would limit settlement payments that can be made in exchange for withdrawing petitions to deny filed in initial licensing, modification, and transfer and assignment proceedings. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3902 (1990). *See e.g., Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989), *recon.*, 5 FCC Rcd 3911 (1990). The rules if adopted would apply to all applications filed for unserved areas and to all cellular applications pending on the effective date of the rules. We believe this is necessary in order to prevent further the possibility of abuses in the licensing process. We seek comment on whether our concerns with the potential for abusive petitions to deny are warranted.

20. We are proposing that when a petition to deny is withdrawn in exchange for money, the payments to the petitioner be limited to the legitimate and prudent expenses in prosecuting the petition. We believe this will prevent abuses, but will not discourage the filing of legitimate petitions. In addition, we are proposing that this limitation on payments be extended to threats to file petitions to deny. The reason for this is that by imposing monetary limits for withdrawing petitions to deny we would otherwise shift the potential for abuse to the pre-petition stage. Potential petitioners would be free to threaten to file a petition to deny and thereafter agree to refrain from filing the petition in exchange for payments in excess of petition-related expenses. We are, therefore, proposing a rule prohibiting any individual or group from making or receiving monetary payments in excess of legitimate and prudent expenses in exchange for refraining from filing a petition to deny. Only payments that do not exceed out-of-pocket expenses directly related to the proposed petition will be permitted under this rule. We tentatively conclude that this proposal will not discourage the continued use of petitions to informally resolve legitimate public interest concerns. *See e.g., Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990).

21. We also find that the policy of permitting payments for settlement of mutually exclusive proposals may encourage the filing of non-*bona fide* applications. Legitimate applicants for new licenses may have an incentive to pay off even non-*bona fide* competing applicants to avoid lengthy proceedings. Non-*bona fide* applicants seriously harm the public interest and serious applicants may spend considerable amounts of money litigating against competing applications. This in turn lengthens the licensing process, wastes Commission resources and delays initiation of service to the public. Therefore, we tentatively conclude that we should adopt a rule to limit settlement payments to the legitimate and prudent out-of-pocket expenses of applicants in prosecuting their applications. *See Amendment of Section 73.3525 of the Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *recon.*, FCC 91-155 (released May 15, 1991), FCC Rcd (1991). We request comment on this proposal.

22. For all of these proposals, we propose to require parties to request approval of the dismissal or withdrawal of their applications. In addition, parties must submit copies any written agreements related to the dismissal or withdrawal of their applications or petitions and affidavits describing the terms of the dismissals or withdrawals. *See* Proposed Rule Sections 22.928 and 22.929.

VI. CONSIDERATIONS INVOLVING TRANSFERS OF APPLICATIONS

23. For the same reasons we adopted Section 22.922 for RSAs we are now proposing to adopt this rule for unserved areas. This rule facilitates application processing while also contributing to the prevention of speculation in applications. We are currently in the process of amending section 22.922. *See Amendment of Section 22.922 (NPRM)*, 5 FCC Rcd 3265 (1990). Any changes adopted for this rule will apply to unserved area applications. Therefore, we propose to prevent the alienation of any interests in or applications for unserved areas. *See* Proposed 22.922.

VII. EX PARTE

24. This is a non-restricted notice and comment Rule Making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, if they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

VIII. COMMENTS

25. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 16, 1991** and reply comments on or before **January 13, 1992.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

IX. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 154(i), 154(j) and 303(r), A NOTICE OF PROPOSED RULE MAKING IS ISSUED.

27. IT IS ORDERED THAT the Secretary shall cause a copy of this Notice to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. Section 603(a).

28. For further information contact, Carmen Borkowski, Mobile Services Division, Common Carrier Bureau at (202) 632-6450.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

We are proposing to adopt additional rules to better define reliable service areas in the cellular radio service and to guarantee that our licensing processes are not abused.

Objectives

The purpose of this Rule Making is to establish additional procedures for application filing and other rules.

Legal Basis

Authority for this notice is contained in Sections 4(i), 4(j) and 303 of the Communications Act of 1934, 47 U.S.C. Sections 154(i), 154(j) and 303.

Reporting, Recordkeeping and Other Compliance Requirements

The rules require that applicants file agreements and an affidavit when payment is made in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection. Applicants will also be required to calculate reliable service areas based on a proposal formula.

Federal Rules Which Overlap, Duplicate or Conflicet With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

The actions contained in this Notice of Proposed Rule Making will affect cellular carriers or proposed cellular carriers. Some of these entities are or may be small. They will be required to comply with the proposed rules but this is estimated not to be a significant economic impact for these entities.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

Alternatives have been considered but for various reasons are not being proposed. These alternatives would not have reduced the burdens.

APPENDIX B
PROPOSED RULES

Part 22 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. Part 22 - PUBLIC MOBILE SERVICE

1. The authority citation for Part 22 continues to read:

AUTHORITY: Sections 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Section 22.28 is amended by revising paragraph (a) to read as follows:

Section 22.28 Dismissal and return of applications.

(a) Except as provided under Sections 22.29, 22.927, 22.928 and 22.929 any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Requests for dismissal shall comply with the provisions of Section 22.29 as appropriate.

* * * * *

3. Section 22.29 is amended by revising paragraph (a) introductory text to read as follows:

Section 22.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) Applicability. Subject to the provisions of Sections 22.927, 22.928 and 22.929 this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

* * * * *

4. Section 22.903 is amended by revising paragraph (c) to read as follows: Section 22.903 Cellular System Service Areas.

* * * * *

(c) CGSAs are that area within the composite outer reliable service area boundaries of the individual cells, calculated by the following formula:

$$d = 1.05 \times H^{0.34} \times P^{0.17}$$

d is the distance from the cell site antenna to the reliable service area boundary in miles;

H is the antenna height above average terrain in feet;

P is the effective radiated power in Watts.

(1) Gulf of Mexico Service Area - CGSAs are that area within the composite outer reliable service area boundaries of the individual cells, calculated by the following formula:

$$d = 1.65 \times H^{0.3} \times P^{0.15}$$

d is the distance from the cell site antenna to the reliable service area boundary in miles;

H is the antenna height above average terrain in feet;

P is the effective radiated power in Watts.

(2) In cases where the applicant believes that this formula does not accurately depict the reliable service area of the base station(s) proposed, the applicant may submit for the Commission's consideration alternative propagation studies in addition to the above required formula. All supporting data and calculations must be included with the results of the studies.

* * * * *

5. Section 22.922 is amended by adding paragraph (b) to read as follows:

22.922 Transfers and assignments of applications, permits or licenses in Rural Service Areas.

* * * * *

(b) *Unserved Areas*. The provisions of paragraph (a) of this section apply to applications for unserved areas.

6. A new Section 22.927 is added to read as follows:

Section 22.927 Dismissal of petitions to deny or withdrawal of informal objections.

(a) Whenever a petition to deny has been filed against any application and the petitioner seeks to dismiss or withdraw the petition to deny, or the filing party seeks to dismiss or withdraw an informal objection, either unilaterally or in exchange for financial consideration, the petitioner or party must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the petitioner nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the petition to deny;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the petition to deny.

(5) In addition, within 5 days of the filing date of the petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(i) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for dismissing or withdrawing the petition to deny; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the petition to deny.

(b) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A petition shall be deemed to be pending before the Commission from the time a petition is filed with Commission until an order of the Commission granting, denying, or dismissing the petition is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner in preparing, filing, and prosecuting its petition for which reimbursement is being sought.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

7. A new section 22.928 is added to read as follows:

Section 22.928 Dismissal of applications.

(a) Any applicant for construction authority, that has filed an application that is mutually exclusive with another application and enters an agreement to remove a conflict between pending applications by withdrawal or dismissal of its application or an amendment thereto, must obtain the approval of the Commission.

(b) The party seeking dismissal of its application must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the petitioner nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the application. Provided that this provision shall not apply to *bona fide* merger agreements;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the application;

(5) In addition, within 5 days of the filing date of the petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(i) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for dismissing or withdrawing the application; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the application;

(b) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A application shall be deemed to be pending before the Commission from the time an application is filed with Commission until an order of the Commission granting or denying the application is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, prosecuting and settling its application for which reimbursement is sought.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

8. A new Section 22.929 is added to read as follows:

Section 22.929 Threats to file petitions to deny or informal objections.

(a) No person shall make or receive any payments in exchange for withdrawing a threat to file or refraining from filing a petition to deny or an informal objection For the purposes of this Section reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector incurred reasonably and directly in preparing to file a petition to deny will not be considered to be payment for refraining from filing a petition to deny or informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement nonfinacial promises are prohibited unless specifically approved by the Commission.

(b) Whenever any payment is made in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection, the applicant must file with the Commission a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) Certification that neither the would-be petitioner, nor any person or organization related to the would-be petitioner, has received or will receive any money or other consideration in connection with the agreement other than legitimate and prudent expenses reasonably incurred in preparing to file the petition to deny;

(2) The terms of any oral agreement;

(c) For purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) "Legitimate and prudent expenses" are those expenses reasonably incurred by a would-be petitioner in preparing to file its petition for which reimbursement is being sought.

(3) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

FOOTNOTES

[1] In a separate First Report and Order we are adopting rules for the filing, processing and selection of applications for unserved areas. *See Amendment of Part 22 to Provide for the Filing and Processing of Applications for Unserved Areas (First Report and Order)*, _____ FCC Rcd _____ (1991).

[2] A 39 dBu contour is the theoretical outer boundary of a service area as predicted by the Carey formula using specific terrain, height and power data. The Commission has used the 39 dBu contour as the definition of a reliable service area for common carrier two-way UHF mobile systems. *See* Section 22.903(c). For purposes of establishing the reliable service area of a station and performing interference studies, we rely on Report No. R-6406, "Technical factors Affecting The Assignment of Facilities in the Public Mobile Service" by Roger B. Carey. The Carey methodology takes into account average terrain, not terrain roughness or terrain features.

[3] Carriers in the top 90 MSA markets were never required by rule to cover a particular percentage of the market area or population.

[4] The parties filing comments in this proceeding are listed in the *First Report and Order*, Appendix A.

[5] Under the present rules, commenters postulate, if such an overlap caused interference problems, the licensees could pull back their contours to resolve the conflict. Under the proposed rules, that option would not be available because contours and CGSAs would have to be coterminous.

[6] Some commenters maintain that reliable service is judged in the real world by practical competitive considerations and not by the Carey prediction method.

[7] *See WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968). *See also, Upjohn Co. v. Food and Drug Administration*, 811 F.2d 1583 (D.C. Cir. 1987); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C. Cir. 1966).

[8] *See* Appendix C. For a given station, the area encompassed by the 32 dBu contour is larger than that encompassed by the 39 dBu contour.

[9] For example, if the constant factor were changed to 0.80, the formula would approximate the distance to the 39 dBu contour.

[10] The Carey method for predicting median field strengths encompasses a number of different but valid procedures for extracting data from the curves contained in Section 22.504 of the rules. The primary method used by the Mobile Services Division staff for routine application processing in the Public Land Mobile Service involves a lengthy Fortran computer program employing third order spline interpolation. However, persons reading the chart directly or employing other computer algorithms might obtain slightly different distances for a given antenna height and transmitting power. Thus, a problem often encountered with the Carey method is consistency. By contrast, the formula we are proposing will always yield the same result for a given antenna height and transmitting power. This will eliminate delays caused by disagreements between parties over minor differences that might arise from the use of the Carey method.

[11] We also request comment on how any new definition of CGSA is related to the Commission's original proposal to permit existing licensees to expand their systems after the fill-in period has run. Parties should also address the issues of when such minor extensions should be permitted and the effect such minor extensions would have on the unserved area licensing process. Because we will fully consider all comments filed pursuant to the original NPRM on the issue of minor extensions, these comments need not be refiled. *See NPRM, supra*, 5 FCC Rcd at 1047.

[12] During the pendency of this proceeding, we are requiring unserved area applicants to propose CGSAs in accordance with existing procedures, i.e., 75 percent of the proposed CGSA must be covered by 39 dBu contours. *See Amendment of Part 22 to Provide for the Filing and Processing of Applications for Unserved Areas and to Modify other Cellular Rules, (First Report and Order)*, _____ FCC Rcd _____ (1991). All of these licenses will be subject to the condition that the unserved area licensee conform its CGSA in accordance with any rules adopted pursuant to this Further Notice within one year of the effective date of the rules.

[13] Kenneth Bullington, *Radio Propagation Fundamentals*, XXXVI Bell System Technical Journal Number 3, 593 (May 1957).

[14] At 500 feet and 500 Watts the distance would be 27 miles.

[15] An application filed by Petroleum Communications Inc., File No. 06360-CL-MP-90, requests authority to make its CGSA coterminous with the entire United States Gulf of Mexico coastline and water territory in the Florida Keys and the Atlantic Ocean. Any action taken on this application will be conditioned on the outcome of this proceeding, will be allowed to amend the application, if necessary, to bring it into conformance with any new rules that are adopted.

[16] Form 401 is filed for a major modification to a system, including a CGSA expansion, must be placed on public notice and entails a 45 day waiting period prior to construction. A Form 489 is filed for permissive changes, which can be constructed and operated without prior Commission approval.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-65

In the Matter of

Policies and Rules Concerning
Interstate 900 Telecommunications
Services

REPORT AND ORDER

Adopted: September 26, 1991; Released: October 23, 1991

By the Commission:

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I. INTRODUCTION

1. With this *Report and Order*, we amend Parts 64 and 68 of our rules to govern the provision of interstate 900 and "pay-per-call" telephone services and line seizure by automatic dialing devices. This action establishes the rules set forth in Appendix B, which are applicable to interexchange carriers (IXCs) and local exchange carriers (LECs), regarding preamble requirements, disclosure of the information provider's identity, blocking, disconnection, automated collect calls, and generation of dual-tone, multifrequency tones. We also amend Part 68 of the Commission's rules to require that autodialers release the called party's telephone line promptly.

II. BACKGROUND

2. On March 14, 1991, this Commission adopted a Notice of Proposed Rulemaking in CC Docket No. 91-65[1] in response to the large number of consumer complaints that the Commission had received on the issue of 900 services.[2] We proposed rules to protect consumers by requiring that IXCs, as part of their interstate 900 transmission service offerings, require that price and product or service identification be given before a consumer incurs a charge for a 900 call. Additionally, we proposed that each IXC provide the name, address and customer service telephone number of any information provider offering 900 services over its network. We also proposed that LECs offer, at no charge on a one-time basis, the option of blocking all 900 calls from a subscriber's telephone, where technically feasible. Finally, we proposed that a subscriber's basic telephone service should not be disconnected for failure to pay interstate 900 service charges. In response to the *NPRM*, approximately 130 comments and reply comments were filed.[3]

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[1] Policies and Rules Concerning Interstate 900 Telecommunications Services, CC Docket No. 91-65, Notice of Proposed Rulemaking, 6 FCC Rcd 1857 (1991) (hereinafter *NPRM*). A discussion of the development of the 900 services industry and consumer complaints related to 900 services issues is contained in paragraphs 2 to 7 of the *NPRM*.

[2] Since 1988, we have received approximately 4,300 complaints dealing with 900 services. Pay-per-call services are currently the most frequent topic of informal complaints to the Commission.

[3] Comments were due on April 24, 1991 and replies on May 24, 1991. A list of commenting parties, including the abbreviations we use herein, is contained in Appendix A. Late comments or replies were filed by Allied, AL PSC, AIPNY, BBBTN/GA, Manor, Comm SS, Delaware, MA AG, ME PUC, NAAG, NYSDPS, PA PUC, USPS, WI PSC, and the FTC. In the interest of a complete record, the Commission accepts these filings as part of the record in this proceeding.

III. DISCUSSION

3. The majority of the commenters generally agreed with the rules as proposed by the Commission in the *NPRM*. A specific discussion of the proposed rules and the considerations raised by the commenters follows.[4]

A. SECTION 64.711 - PREAMBLE

4. *Introduction*. Section 64.711 of the proposed rules would require that all interstate pay-per-call services begin with an introductory message that would disclose the price, the average cost of the call and a description of the product, information or service to be provided. The *NPRM* requested comments on whether the preamble is necessary for programs that are used for polling, provide information in a non-verbal format or are nominally priced. The proposed rule also would require that the timing of a pay-per-call program begin only after a specific, identified event, such as a signal tone, following the disclosure message. Preambles for all programs "aimed at or likely to be of interest to" children under eighteen would contain a warning that the caller should hang up unless he or she has parental permission. Finally, the rule proposed that the caller be able to bypass the preamble on subsequent calls but that this capability must be disabled if the price for the program has increased since the caller's last call to that program.

1. Section 64.711 - Preamble Requirement

5. *Proposal*. The *NPRM* would require a preamble on all interstate 900 programs that would disclose specific price and product or service information and give the caller an opportunity to hang up before charges begin.

6. *Comments*. Some commenters argue that the First Amendment protections of free speech bar the government from imposing preamble requirements on pay-per-call services.[5] Other commenters reply that pay-per-call services are commercial speech, which is given a much lower level of protection under the First Amendment, and that governments are permitted to enact restrictions on commercial speech in order to achieve legitimate state interests such as the protection of consumers.[6] Many information providers suggest that restrictions on advertising are a superior, and less intrusive, means of protecting consumers.[7] Consumer Action and NAAG, however, counter that advertising disclosures are not a sufficient substitute for a preamble.[8] One state attorney general reported on a recent telephone survey which revealed a very high level of consumer puzzlement over pay-per-call services.[9]

7. *Decision*. We are mandating a simple, brief preamble to inform consumers of essential information which they will need to make an informed purchase decision. In response to commenters' challenges to the constitutionality of the preamble,[10] we observe at the outset that the preamble in no way restricts, prohibits or dictates the content of the provider's subsequent message. Thus, judicial precedent regarding state efforts to prohibit speech, commercial or otherwise, is not controlling.[11] Moreover, the preamble presents only information concerning the terms under which the consumer will enter into the transaction with the information provider, *i.e.*, the name of the entity from whom the consumer will purchase the information or service, a brief description of the information or service to be provided, and the price terms of the transaction. The preamble does not involve political, religious or other speech which is entitled to heightened First Amendment protection. Therefore, judicial precedent regarding government-mandated political or religious speech is not controlling.[12]

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[4] The *NPRM* proposed Section 64.710, 47 C.F.R. § 64.710, which would require that common carriers provide interstate 900 transmission services only under the terms and conditions prescribed in the rules adopted herein. Few commenters address this issue. The comments support our tentative conclusion, which we make final, that the Commission has jurisdiction to undertake the regulatory actions described herein.

[5] *E.g.*, Comments of PPI at 11-23 (Citing Riley v. National Federation of the Blind of N.C., 487 U.S. 781 (1988), and contending that in pay-per-call programming most messages are not solicitations but pure speech, and therefore guaranteed the maximum protection under the First Amendment); Comments of COAC at 5; Comments of AIPNY at 2-5 (violation of information provider's and caller's First Amendment rights and information provider's Fifth Amendment rights; alternative is advertising disclosures); Comments of IIA at 19-22 (acknowledges that degree of protection might vary depending on the nature of the speech but claims that the 900 marketplace "surely" contains programs entitled to a high degree of protection, such as political or religious programs).

[6] Reply Comments of Attorney General Humphrey at 4-6; Reply Comments of USCC at 3-5.

[7] Comments of PPI at 6; Comments of Teleline at 1-2;Comments of Island at 3; Comments of CC/ABC at 2; *but see*, Reply Comments of Attorney General Humphrey at 8-9 (carrier review of advertising could be more expensive for information providers and more difficult for carriers than preamble disclosures); Reply Comments of SW Bell at 2-3 (several of the 900 services have no print or broadcast advertising so end users would get no price information without preamble; reviewing each advertisement is impossible.)

[8] Reply Comments of Consumer Action at 2-3; Comments of NAAG "The 900 Report" at 33 ("additional safeguards, such as preambles, are needed to give point of purchase information and to act as a second level of protection for consumers who respond to advertising that may not comply with the standards and the law.")

[9] Reply Comments of TN AG at 2-5 (Over one-third of the 802 respondents did not know that charges for 900 services depend on the nature of services provided. Only 20.9% knew (correctly) that their basic phone service could not be terminated for 900 service delinquencies. 14.3% did not know what a 900 number was. 5.5% believed that 900 calls, like 800 calls, are free to the calling party. 15.6% believed there was a flat charge for all 900 calls. Of the respondents who had made 900 calls, 48.7% were not satisfied with the price of the call. Over one-third expressed dissatisfaction with the service of the call. Nearly one-third had no idea where to report a problem with a 900 program operator. 42.1% believed that complaints should go to the phone company, 2.1% said complaints should go to the FCC, 10.7% said the PSC, and the other responses were scattered among other state and local agencies. The survey results underscore that consumers are still far down the learning curve when dealing with pay-per-call services).

[10] We note that the constitutionality of the parental permission warning to children, see Section III. A. 6, infra, is unchallenged.

[11] *See, e.g.*, Sable Communications v. FCC, 429 U.S. 115 (1989); Erznozik v. City of Jacksonville,422 U.S. 205 (1975) (cited by PPI).

[12] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); Miami

8. The issue here is whether the Commission can require disclosure of factual information concerning the terms of the pay-per-call commercial transaction prior to the commencement of the information provider's message. When the government requires disclosure in the context of commercial speech, which is entitled to lesser protection than other forms of protected speech, the advertiser's First Amendment rights are adequately protected so long as the disclosure requirement is "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). When the government attempts to require disclosure outside the context of commercial speech or where any commercial speech is "inextricably intertwined" with fully protected noncommercial speech (such as charitable solicitations), the disclosure must be narrowly tailored to achieve the state's interest in preventing fraud on consumers. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

9. We believe the preamble requirement we adopt herein is in the nature of commercial speech, and therefore is properly examined under the standard enunciated in *Zauderer*. Commercial speech is speech that "proposes a commercial transaction." *Zauderer*, 471 U.S. at 637 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978)). As noted above, the preamble outlines the terms under which the consumer may purchase the information or service from the provider. This is the type of information one would expect to find in an advertisement soliciting consumers to purchase a product or service.

10. The "narrowly tailored" test used in *Riley* does not apply here. In *Riley*, the state required professional fundraisers to disclose to prospective donors the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. In applying a more exacting "narrowly tailored" test, the Court declined to consider the disclosure message separately from the charitable solicitation. Without deciding whether the disclosure message was commercial speech, the Court found that the disclosure was "inextricably intertwined" with the charitable solicitation itself, and therefore examined the speech taken as a whole and the effect of the disclosure on the charitable solicitation. *Riley*, 487 U.S. at 796.[13]

11. Here, in contrast, the preamble is distinct and segregated from the information provider's message. The preamble precedes the message, informs the caller that billing will not commence until after the disclosure, and indicates that the caller may hang up before the provider's message begins without incurring a charge for the call. The preamble does not affect the information provider's basic message, unlike in *Riley*, where disclosing what percentage of charitable donations actually go to charitable causes goes to the heart of the fundraiser's message, *i.e.*, soliciting charitable donations. Under these circumstances, it cannot be said that the preamble is "inextricably intertwined" with the provider's basic message. Consumers should perceive the preamble as a separate message concerning the terms under which the consumer may purchase the information or service, rather than as part of the provider's basic message itself. Thus, we conclude that *Zauderer*, not *Riley*, is the applicable standard by which to judge the constitutionality of the preamble disclosure requirement.

12. The preamble requirement at issue here fully satisfies the constitutional standard of reasonableness set forth in *Zauderer*. The record in this proceeding clearly demonstrates the widespread deception and abuse of consumers[14] and children[15] which have occurred in the 900 services or pay-per-call industry. We find, based on the record before us, that pay-per-call services have a significant potential for infringement of, and in fact are infringing, consumers' rights to make informed decisions about telephone calls that are billed at an amount often far greater than the transmission charge with which consumers are more familiar. The preamble is designed to prevent deception and confusion by providing the consumer "purely factual and uncontroversial information about the terms under which [the] services will be available," thereby enabling the consumer to make an informed purchasing decision. See *Zauderer*, 471 U.S. at 651. While we recognize that the preamble requirement does impose some costs on the information providers, [16] we believe that those costs are reasonable when balanced against the consumer confusion due to inadequate information and the widespread and growing abuse of consumers that has been reported in the pay-per-call industry.[17] We find that disclosure requirements in pay-per-call advertising are not as effective as the preamble requirement adopted herein, and thus alone are not reasonable alternatives. Advertising requirements would be difficult to police in the pay-per-call industry, where consumer interest in calling may be generated in many ways, including many types of advertising, and many of these tools, such as telephone solicitation, are transitory. Because such requirements could not be effectively enforced, compliance would be problematic. In contrast, consumers will easily be able to

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Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943)(cited by PPI).

[13] Significantly, the Court found that the compelled disclosure "will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent." *Riley*, 487 U.S. at 799.

[14] Comments of NAAG at "The 900 Report" at iii (consumer fraud "nearly endemic"); Comments of Attorney General Humphrey at 11-12, 16 (900 number deception preys on the weak, disadvantaged, elderly, sick and poor. In Minnesota, the most common complaint is that cost was not disclosed).

[15] Comments of Attorney General Humphrey at 11-12 (part of the targeted population is children, who often lack the sophistication and maturity to understand the cost and nature of pay-per-call services offered through the pervasive media of television and 900 numbers and who are often least resistant to the impulse buying tendencies such promotions invite); Reply Comments of USSC at 4-5 (pay-per-call services targeting an audience of children raise additional constitutional concerns favoring regulation).

[16] *E.g.*, Comments of ACI at 6 (cost of the sample preamble suggested in the *NPRM* is $.12 to $.15 per call).

[17] *NPRM*, 6 FCC Rcd at 1857-58; Comments of Attorney General Humphrey at 1415 (501 complaints about 900 service received since January 1, 1990); Reply Comments of the TPUC at 1 (over 30,000 letters and complaints regarding 976 and 900 services); Comments of Mass. AG at 1 (close to 500 complaints a year about 900 services to Department of Public Utilities); Reply Comments of Iowa UB at 2 (on a monthly basis, the Board received four times the average number of complaints in 1991 compared to 1990); Comments of Ohio PUC at Attachment A (complaints regarding 900 and 900-like services increased from 147 in first quarter of 1990 to 372 in the first quarter of 1991).

document instances where the required preamble was not included in a 900 services call. Accordingly, we conclude that the preamble disclosure requirement we adopt today is "reasonably related" to our valid interest in "preventing deception of consumers" with respect to pay-per-call services. *Zauderer*, 471 U.S. at 651.[18]

2. Section 64.711 - Exceptions to Preamble Requirement

13. *Proposal.* The *NPRM* requested comments on whether some categories of 900 programs should be exempted from the preamble requirement. Specifically, it identified polling services, programs provided in a nonverbal format and programs of nominal cost as possible categories of exemption from the preamble requirement.

14. *Comments.* Commenters generally support some exceptions to the preamble requirement, although a few commenters oppose any exceptions.[19] Most commenters, however, favor excepting either polling or nominally priced programs, or both. The typical justification for excepting polling programs is that they have historically been of low cost and short duration and are not typically the subject of consumer complaints. Consumer Action, however, comments that it has encountered numerous (instances of fraudulent polls, contests and other low-cost programs that would take advantage of any exceptions to this rule.[20] AT&T states that calls to its polling services are usually less than nine seconds in duration.[21]

15. The commenters who favor excepting nominally priced programs argue that the preamble requirement will have a very severe adverse impact on them because the cost of the preamble will be the same for low- and high-priced programs but the low-priced programs would have less revenue to offset those costs. The commenters suggest a range of standards for determining what is a "nominally priced" program. The lowest standard suggested is that there be exceptions only for polling programs charging $.50 or less per call with no exception for usage sensitive[22] programs.[23] Other commenters recommend exceptions for programs with flat rate charges of $1.00 or less per call with no exception for usage sensitive calls[24] , or flat rate charges of $2.00 or less per call, with no exception for usage sensitive calls.[25] Most of the industry commenters suggest that preambles not be required for programs that charge less than $5.00 per minute or have a maximum per call charge of $10.00.[26]

16. Relatively few comments were received on nonverbal programming. Most commenters who dealt with the issue recommend that these programs be excepted from the preamble requirement because a preamble is not suitable for such programs and because they are not a current subject of abuse of consumers.[27]

17. AT&T also requests exemption for programs that use "asynchronous technology."[28] AT&T originally estimated that it would cost it more than $6 million and take two years to develop the capability to put preambles on these programs. [29]

18. *Decision.* We conclude that there should be a limited exception from the preamble requirement for nominally priced programs. A preamble would have a disproportionately greater adverse impact on nominally priced programs that would, in our view, outweigh the benefits consumers might realize from the disclosure. The standard that many in the industry suggest, however, for determining what is nominal, $5.00 per minute and $10.00 per call, is excessive even if the $10.00 per call limit applies to usage sensitive calls. The record gives us ample cause for concern that consumers will suffer injury if programs charging up to $10.00 per call are exempted from the preamble requirement.[30] We believe that $2.00 per call represents a reasonable figure that strikes a balance between the need to protect consumers, on the one hand, and the need to avoid imposing disproportionately high disclosure costs on inexpensive flat-rate calls, on the other hand. Therefore, we find that all usage sensitive programs and all programs charging more than $2.00 per call should be required to have preambles. We recognize that information providers may pass the cost of providing preambles along to consumers in their charges for these

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[18] We also conclude that the preamble meets the "narrowly tailored" test set forth in *Riley*. Having determined that disclosure requirements in pay-per-call advertising would be ineffective, our brief, factual preamble disclosure requirement preceding the provider's actual message is narrowly tailored to achieve the valid purpose of enabling consumers to make an informed purchasing decision.

[19] Comments of NAAG at 6-7; Reply Comments of Consumer Action at 1.

[20] Reply Comments of Consumer Action at 2.

[21] Comments of AT&T at 6.

[22] "Usage sensitive" programs are those charged by the minute or some other unit of time so that the total cost of the call is dependent on how long the caller stays on the line.

[23] Comments of Attorney General Humphrey at 28.

[24] *E.g.*, Comments of MPSC at 3; Reply Comments of Consumer Action at 2.

[25] Comments of IIA at 29; Comments of SW Bell at 2 (programs with a flat rate charge of two dollars or less should be exempt from the preamble requirement; low priced flat rate calls would thereby be handled in an efficient manner for both the customer and the network); Comments of the USTA at 5; Comments of Coalition at 5 (surmises that complaints received by Commission have not involved programs for which charge is $2.00 or less per call; unless there have been complaints, there may not be a need for a price disclosure for these programs); Comments of IURC at 3 (would consider "nominal" to be anything less than $1.50 per call).

[26] *E.g.*, Comments of AT&T at 8; Comments of COAC at 7; Comments of PPI at 27.

[27] Comments of DMA at 5 (preambles on services that provide direct access to computer databases would either be ineffective, unduly disruptive or both); Comments of IIA at 28 (cites delivery of printed matter via facsimile, downloading of data or computer software or access to computerized databases as examples of non-verbal services); *but see* Comments of IT at 7-8 (supports preamble on non-verbal programs); Comments of MPSC at 3 (should be no exception to preamble for non-verbal programs unless they are priced less than $1.00 per call.)

[28] Comments of AT&T at 7 ("asynchronous technology" allows numerous callers to listen simultaneously to a sponsor's live or recorded message, which plays continuously. Callers "barge in" to these programs by joining them in progress.)

[29] *Id* . at 7 n. *.

[30] Comments of Attorney General Humphrey at Exhibit 2 (this exhibit contains logs of pay-per-call complaints received by the commenter's office; many concern programs priced below the $5.00 per minute or the $10.00 per call threshold suggested by other commenters); Reply Comments of SW Bell at 2 (many programs which cause the most complaints and result in the highest percentage of adjustments are usage sensitive programs under $5.00 per minute).

services. For nominally priced programs, we believe that the increased cost and inconvenience caused by the preamble would exceed the benefit that consumers would receive through the preamble disclosures.

19. We are persuaded that there should be no specific exemptions from the preamble requirement for any other category of programming. The fact that polling programs have historically been of low cost and short duration provides no assurance that they will continue to be so, and their duration is irrelevant to the question of whether consumers are being adequately protected. To the extent that they continue to be low cost, polling programs will be exempt from the preamble requirement as nominally priced programs. If polling programs exceed the threshold for nominally priced programs, then the arguments for exempting them are outweighed by the need to protect the consumer. The arguments for exempting non-verbal programs from the preamble requirement center around the technical difficulty of providing a preamble and the lack of past consumer abuse or complaints. There is insufficient evidence in the record to indicate that technical difficulties are so great as to warrant an exception from the preamble requirement. The preamble for non-verbal programs would not need to be verbal, but rather could be in a program format compatible with the technology used to deliver the program, although it must convey the necessary information to the caller and allow the caller the opportunity to hang up without being charged. Finally, with respect to asynchronous programs, we find that there is not sufficient information in the record to justify a broad exemption for such programs. Moreover, AT&T, the primary advocate of this exception, has not adequately demonstrated that it is not technically feasible to provide preambles for these programs. There is no evidence in the record that this category of programming will be less susceptible to consumer confusion or other harm to consumers than other types of pay-per-call programs.

3. Section 64.711(a) - Disclosure of Price

20. *Proposal.* The proposed rule would require that the preamble begin with a disclosure message that clearly states the cost of the call, including all per-call charges. For calls billed on a usage sensitive basis, the preamble would have to state all rates, by minute or other unit of time, any minimum charges, and the average cost of the usage sensitive call. The average cost need not be disclosed, however, for a usage sensitive call if the caller has sole control over the length of an interactive call.

21. *Comments.* The commenters support the requirement that the preamble must disclose all flat-rate charges and, for usage sensitive programs, the rate per minute or other unit of time. Most comments on this section focus on the requirement that the preamble disclose "average costs" of usage sensitive calls. Some of the industry commenters state that disclosure of average costs should not be required because it would be difficult to provide this information.[31] Another industry commenter, however, views the requirement as reasonable.[32] Some government commenters assert that the exception allowing some interactive calls not to state the average price would swallow the rule.[33] One commenter argues that the minimum charge disclosure requirement is redundant.[34]

22. *Decision.* Disclosure of all the charges for a pay-per-call program is in the public interest because it is the fundamental mechanism for providing consumers with the information they need to make an informed choice about a pay-percall service, which may be costly. We have considered the arguments of the commenters regarding disclosure of average cost and conclude that, for programs of determinable length, a more meaningful disclosure would be the total price necessary to obtain the full message. The benefits to consumers in the form of full knowledge of the total cost for pay-per-call programs which have a predictable duration will outweigh the minimal difficulties that some information providers may have in implementing this disclosure requirement. Therefore, we change the rule to state that preambles must disclose the total price of the call if there is a determinable length for the program. Moreover, the requirement that the preamble disclose minimum cost is not redundant with requiring the per-unit cost, when a program quotes a per-minute rate but then requires, for example, a ten-minute minimum.[35]

23. We acknowledge the concerns of the government commenters about the absence of average cost information for interactive calls. However, we are persuaded by the comments of industry about the difficulty of calculating a meaningful average cost for interactive calls. Moreover, we conclude that a total cost requirement for such calls would not be appropriate. We are also concerned that an average cost requirement could, itself, be used to deceive consumers. Thus, for programs without a determinable length, such as interactive or asynchronous programs, we will not require disclosure of either total or average costs.

4. Section 64.711(b) - Description of Information, Product or Service

24. *Proposal.* The proposed rule would require that the preamble describe the information, product or service that the caller will receive if he or she continues the call.

25. *Comments.* Many commenters express concern that this rule would require such detailed disclosures that it would have a seriously adverse impact on the cost of the preamble and on the marketability of the programs.[36] Other commenters stress the importance of the program-content disclosures or acknowledge that they are reasonable.[37] The FTC comments that determining whether a preamble includes an "accurate description" of the pro-

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[31] Comments of NYCOM at 4; Reply Comments of AT&T at 3 n. *; Comments of Pac Tel at 2-3.

[32] *See* Comments of IT at 5.

[33] Comments of Rep. Gordon at 4; Comments of Attorney General Humphrey at 25-27.

[34] Comments of Pac Tel at 2-3 ("seems redundant" as long as per-call or per-minute charges are clearly stated).

[35] *See, e.g.*, Comments of Attorney General Humphrey at 26-27; Comments of NASUCA at 8-9; Comments of VA AG at 3.

[36] Comments of Allied at 5; Comments of IT at 10; Comments of PMAA at 1; Comments of Teleline at 5; Comments of United at 3.

[37] *E.g.*, Comments of NASUCA at 10; Comments of Conn. AG at 6; Comments of Nycom at 4.

gram may not be a clear-cut task.[38] The FTC cautions against requiring too detailed a disclosure of program content in the preamble and notes that a case-by-case review of programs by the agency having jurisdiction over program content, the FTC, may have certain advantages over an industry-wide rule. The FTC recommends that this provision be interpreted to require disclosure of only a brief description of the program content. The FTC notes that under this approach, information providers that provide false or misleading information to consumers in advertising, preambles or information programs would be subject to investigation by the relevant regulatory authorities, including the FTC. Finally, commenters suggest that we require that the preamble also include the name of the information provider.[39]

26. *Decision.* We are persuaded by the cautionary comments of the FTC that requiring a detailed disclosure of program content could unnecessarily complicate the preamble and that other state and federal agencies have more effective ways of addressing this issue than this Commission does. Therefore, we will interpret this rule to require only a general description such as "sports scores" or "stock quotes" rather than a detailed description of all possible information, products or services that the consumer could receive by calling this number. We understand that there are commenters who would prefer more detailed disclosure in the preamble of all possible information, products or services as an additional means of protecting the consumer. Nevertheless, we find the comments of the FTC, the federal agency with expertise in dealing with deceptive practices, to be very persuasive when it argues that a preamble requiring complete content disclosure would be of questionable effectiveness and difficult to apply and that there are other, more effective ways to deal with this issue. Further, we require that the preamble disclose the name of the information provider. This requirement will provide important additional information to the consumer with little or no additional burden on the IXCs or information providers.

5. Section 64.711(c) - Commencement of Charges

27. *Proposal.* The *NPRM* proposed that the preamble must inform the caller that billing will commence only after a specific identified event, such as a signal tone, following the disclosure message.

28. *Comments.* The commenters raise several concerns with this section. First, IXCs comment that their networks do not have the capability to generate a signal tone or that the billing systems are set up to time calls as soon as they receive answer supervision[40] at the start of the call.)[41] MCI comments that the proposed rule would require each 900 services call to have two starts for billing purposes, one for the preamble and one for the message, and that this system will be costly and difficult to implement. Information providers also advocate that billing for the call revert back to its beginning when the caller remains on the line after the preamble. [42] One LEC states that it does not have the technical capability to know whether the preamble is included in the billed time and that LECs should not be responsible for ensuring that billing is correct.[43]

29. Second, many commenters note that the proposed rule does not require any minimum period of time between the end of the verbal preamble warning and the beginning of billing. The suggestions for remedying this deficiency include: (a) requiring a minimum time period between the end of the message and the beginning of billing, such as ten seconds,[44] or five seconds[45] of silence; and (b) requiring that information providers "provide a reasonable opportunity for the caller to disconnect before that event."[46]

30. *Decision.* We find that carriers should not be allowed to bill callers for the preamble portion of a pay-per-call service. We recognize that this requirement will create some initial difficulties for carriers who may now include that time in the charges, but find it to be consistent with consumer expectations and essential to prevent abusive use of the preamble requirement. The alternative suggested by the commenters, charging callers for the entire duration of the call if they stay on the line after the preamble, is seriously flawed because it could impose very high charges on callers for the preamble time, the length of which is not controlled by the consumer. Another alternative might be to allow carriers to bill callers for the preamble time at tariffed communications rates. However, we reject this approach because it would result in a very complex rate structure that would be very difficult for callers to understand and carriers to bill. As many commenters indicate, information providers will necessarily pass the cost of complying with the preamble requirement on to consumers as a cost of doing business.[47] Information providers obviously will seek to recover their costs of doing business, and we expect them to do so, but we reaffirm that billing for usage sensitive calls may only begin after the preamble ends.

31. We are also persuaded that a caller should have a reasonable opportunity to disconnect after the preamble message has ended but before billing begins. Rather than specify a minimum time period, we believe that the better course is to adopt the language recommended by NAAG which states that the program "must provide a reasonable opportunity for the caller to disconnect before" the signal tone or other identified event required by the rule.

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[38] Comments of the FTC at 31-32.

[39] Comments of Conn. AG at 8 (advocates disclosing name, address and telephone number of information provider in preamble); Comments of Attorney General Humphrey at 29 (should state information provider's name); Reply Comments of DMA at 2,4 (advocates disclosing sponsor's name and nature of service); Comments of Nixon at 3-7 (disclosure of name would help prevent trademark infringement by telemarketers).

[40] "Answer supervision" is the term used by telephone companies to describe the signal that the called station (or other CPE) emits to tell the telephone companies' billing equipment that a call has been answered and that billing should commence. *See* Petition for Adoption of New Section 68.314(h) of the Commission's Rules, Notice of Proposed Rule Making, CC Docket No. 89-114, 4 FCC Rcd 4577, 4585 n. 3 (1989).

[41] Comments of AT&T at 4; Comments of MCI at 3; Reply Comments of AT&T at 5 n. *.

[42] Comments of ACI at 8; Comments of IIA at 25; Comments of NAIS at 9.

[43] Comments of SW Bell at 2.

[44] Comments of NAAG at 7-8.

[45] Comments of NASUCA at 10; Comments of AT&T at 5; Reply Comments of AT&T at 5 n. *.

[46] Comments of NAAG at 10.

[47] *E.g.*, Comments of ACI at 3 (cost of the sample preamble suggested in the *NPRM* is $.12 to $.15 per call).

6. Section 64.711(d) - Parental Permission Warning to Children

32. *Proposal.* The *NPRM* proposed that the preamble on 900 interstate offerings "aimed at or likely to be of interest to children under the age of eighteen" must contain a statement that the caller should hang up unless he or she has parental permission.

33. *Comments.* The record shows that calls by children to 900 programs are a common cause of complaints by consumers.[48] The proposed standard for preambles on children's programming, however, provoked considerable comment. First, information providers and carriers indicate that the standard, programs "aimed at or likely to be of interest to" children, is very broad.[49] Comptel argues that if this standard is adopted, it would recommend that its member carriers should be allowed to file tariffs requiring the children's preamble warning on all programs because the proposed test is so broad that the only way to ensure that a carrier meets its obligations under the rule is to require the warning on all programming.[50] On the other hand, some government agencies and consumer groups support the proposal or advocate stronger action.[51]

34. Second, many industry commenters argue that the age standard is too high and should be reduced; twelve or younger was the most commonly suggested standard.[52] Again, government agencies and consumer groups express contrary views, arguing that we should retain or strengthen the proposed limit of "under the age of eighteen."[53] One commenter argues that verbal warnings to children are largely ineffective and states that an outright ban on programs aimed at children under eighteen is a preferable solution.[54]

35. *Decision.* Although the industry commenters raise some valid points about the difficulty of applying the test proposed in the *NPRM*, we must strike a balance between adverse effects on the industry and achieving adequate protection for children and their parents. We are persuaded by the comments of the government and industry commenters that effective protection of children requires that the preamble warning be applied to all programs "aimed at or likely to be of interest to" children. The "marketed to" test proposed by some commenters does not, in our judgment, adequately protect children because it leaves the information provider with too much discretion to determine when the warning for children should apply. For example, programs providing sports scores or information about celebrities might be "of interest to" teenagers and thus frequently accessed by them but an information provider could argue that they are not "marketed to" teenagers. Further, the age limit of "twelve or younger," which some commenters suggest, would leave many abuses undeterred[55] and we are persuaded that the age limit should remain at less than eighteen.[56] We do not agree with the National Consumer's League that programs aimed at children under eighteen should be banned, however. Our adopted rule, combined with other provisions such as the requirement for voluntary blocking, should strengthen parental ability to control and deal with improper use of 900 services by minors.

7. Section 64.711(e) - Bypass of Preamble by Repeat Callers

36. *Proposal.* The *NPRM* proposed that callers be given the opportunity to bypass the preamble on subsequent calls, unless the charge for those calls has increased since the caller's last use, provided that the caller is in sole control of the bypass capability.

37. *Comments.* Commenters predominantly support the concept of a bypass mechanism for the preamble.[57] A significant minority of the commenters, however, opposes the bypass mechanism.[58] Most of the comments on this issue center on the question of how the bypass mechanism would be disabled whenever the price of a 900 services program increased. Many commenters state that the rule proposed in the *NPRM*, that the bypass mechanism be disabled if the price has increased "since the caller's last use" of the 900 program, is not practical because it is not possible for many programs to determine whether a caller has called a program before or whether a particular call is his or her first call after a price increase.[59] In the alternative, commenters suggest that the Commission require that the bypass mechanism be disabled for a fixed period of time after a price increase.[60]

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[48] *See* Comments of Attorney General Humphrey at 8; Comments of FTC at 12-13, 33-37; Comments of NASUCA at 11; Comments of NCL at 6-8; Reply Comments of USCC at 4-5.

[49] *E.g.*, Comments of ANPA at 4.

[50] Comments of Comptel at 8.

[51] *E.g.*, Reply Comments of Consumer Action at 5 (advocates per-minute and per-call price caps as well as specific language in advertisements and preambles); Comments of Attorney General Humphrey at 31-32 (preamble warning for children should be applied in every program because of the difficulty in deciding which programs meet the standard); Comments of NAAG at 8 (children's programs have such a high potential for unfairness to parents and children that identification access code system is only fair way to offer them).

[52] *E.g.*, Comments of ANPA at 4-5 (should lower age limit); Comments of AT&T at 5 n. * (advocates age 12, relying on Children's Advertising Review Unit's suggested standard); Comments of IT at 9 (suggests age 12; says FCC uses that age in other proceedings).

[53] Reply Comments of Consumer Action at 5 (supports *NPRM* standard); Comments of NAAG at 8 (supports *NPRM* standard).

[54] Comments of NCL at 2, 6-8.

[55] Reply Comments of Consumer Action at 5 (access to pay-per-call services is not analogous to other purchases which teenagers typically make because of the amounts potentially involved and the ability to incur charges on the parents' telephone without prior permission); Comments of NAAG at 8.

[56] Comments of Consumer Action at 5-6 (it is only at the age of eighteen that a person can contract for services and then be held legally liable for 900 calls made without permission); Comments of Attorney General Humphrey at 32 (since 900 service is not telephone service, parents are not legally responsible for unauthorized calls made by their minor children).

[57] *E.g.*, Comments of ANPA at 5; Comments of AT&T at 6 n. **; Comments of IUCC at 7; Comments of DMA at 4; Comments of MCI at 4; Comments of NASUCA at 12; Comments of Cal. CA at 4.

[58] *E.g.*, Comments of NCL at 8-9; Comments of VA AG at 6; Comments of Conn. AG at 9; Comments of NAAG at 8 (bypass unworkable and likely to be abused); Comments of Allied at 2 (opposes bypass; caller needs to know cost each and every time).

[59] *E.g.*, Comments of NASUCA at 12.

[60] Comments of IT at 7 (disable for 48 hours); Comments of MCI at 3-4 (30 days); Comments of NAAG at 11 (30 days);

38. *Decision.* The Commission adopts the proposed bypass rule but modifies it as commenters suggest: the bypass mechanism must be disabled for thirty days after a program increases its price. This rule will allow repeat subscribers to a 900 service, at their option, to avoid listening to informational material that they have heard at least once before and simply do not want to hear again. However, the instructions on how to use the bypass mechanism, if a bypass mechanism is provided, must be at the end of the preamble or the end of the program. Our approval of a bypass mechanism is intended to allow repeat callers to avoid the delay and inconvenience of listening to information that they have already heard. Accordingly, it should not be used to allow first-time callers to avoid hearing the material that we have found to be of value in deterring abuses

B. SECTION 64.712 - IDENTIFICATION OF INFORMATION PROVIDERS

39. *Proposal.* The *NRPM* would require the carrier providing interstate 900 transmission service to provide the name, address and customer service telephone number of any information provider to whom it provides 900 service, either "directly or through another entity such as a service bureau, as well as that information for any other entity to whom the caller might be responsible for paying the 900 service charge. The proposed rule further requires that the carrier shall provide that information upon verbal or written request.

40. *Comments.* The comments on this issue heavily favor the proposed rule.[61] Some commenters, however, either criticize the proposed rule[62] or suggest significant modifications that would dilute the disclosure requirement. Specifically, Telesphere argues that carriers should be allowed to provide "other information that will best address the consumer's inquiry" and should be able to do so in writing.[63] MCI argues that the duty of the IXC should stop at its customer, which may be the service bureau, and notes that information providers frequently sell their receivables to another entity to whom the consumer may then be responsible for paying the 900 service charge.[64] MCI argues that it cannot track the current ownership of receivables for hundreds or thousands of information providers and give consumers that information. The IIA, however, "strongly supports" this proposed rule and agrees that the focus should be on "whatever party is legally responsible" - to consumers and regulators - for the content of the 900 service and the fulfillment of any commitments made by the program.[65]

41. Several government commenters argue that the requirement should be modified to strengthen it. Specifically, they suggest that we require that the information be provided free,[66] and in a timely manner.[67] NCL advocates that the IXCs cooperate to set up a national 900 number registry that consumers could reach through a toll-free number.[68] Other commenters suggest that each IXC offering pay-per-call services be required to set up a toll-free number to handle these inquiries.[69] The USPS notes that under the rules proposed in the *NPRM*, the consumer will not know which IXC offers a particular program until the bill arrives.[70] The USPS proposes that the name of the IXC be added to the preamble to give callers the opportunity to deal with problems at the time the call is made, rather than requiring them to wait for the bill from their common carrier.

42. *Decision.* We adopt the proposed rule requiring IXCs to provide the identifying information. This requirement is crucial to our efforts to ensure that consumers have full knowledge of the programs that they are accessing. The burdens on the industry are very minor in comparison to the benefit to consumers. We reject the suggestions that we allow the carriers to provide consumers with identifying information only about service bureaus or entities other than the information providers. MCI and Telesphere argue that this will lead to improved customer service because entities other than the information provider may be better able to answer customer queries about account balances, adjustment policies, and other matters. Although this may be true, these commenters ignore that the existing structure of the industry has afforded "a built-in shield between the unscrupulous marketers and the public."[71] We recognize that, in some individual cases, the information provider will not have the personnel or the accounting records to answer consumer inquiries or to handle complaints. Nevertheless, we believe that it is far more important to allow individual consumers, consumer groups, and law enforcement agencies to identify information providers. Correct identification of the information provider assists consumers who may want to make complaints to the information provider or institute civil or criminal proceedings against it. Requiring that information providers be accessible to consumers imposes no more of a burden on them than any other business faces in dealing with customers. There is nothing in our ruling which prevents the carrier from providing additional information, such as the name and telephone number of a service bureau that is answering customer inquiries for the information provider. We emphasize, however, that carriers must, upon request, pro-

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Comments of NASUCA at 12 (one month); Comments of Teleline at 4 ("a reasonable time"); Comments of Telesphere at 11 (one week).

[61] *E.g.*, Comments of AT&T at 8 n. *; Comments of COAC at 8; Comments of Coalition at 6 (information provider identification requirement went into effect in California in 1985 and does not seem to have provided any difficulties for either carriers or information providers).

[62] *E.g.*, Comments of NAIS at 10-11 (supports consumer's right to know identity of information provider but questions utility of the requirement).

[63] Comments of Telesphere at 14-16.

[64] Comments of MCI at 4-5.

[65] Comments of IIA at 31.

[66] Comments of MO OPC at 4; Comments of Cal. CA at 5 (providing a 900 number for an information provider's customer service number is not compliance).

[67] Comments of NASUCA at 13.

[68] Comments of NCL at 10-11.

[69] Reply Comments of AT&T at 9 (there is broad support among commenters for a toll-free number to provide this information).

[70] Comments of USPS at 2.

[71] Comments of NAAG," The 900 Report" at 8; *see also* Comments of the BBBNY at 1 (strongly supports this requirement; monitoring and law enforcement will improve significantly if information provider names and addresses are made available).

vide identifying information about information providers to consumers or other entities, including state or federal agencies, that request the information.[72]

43. We agree that the proposed rule would be enhanced by specifying that the information must be provided at no charge and within a reasonable time. The intent of this rule is to provide consumers with the information they need to seek redress effectively from information providers. Charging a fee for that information or delaying a response could reduce or eliminate the value of the information. Therefore, we order that the information specified in Section 64.712 be provided at no charge to the requester, and that it be provided in a reasonable time, not exceeding three days. It is our expectation that this information shall, in all but exceptional cases, be provided with no delay.

C. SECTION 64.713 - BLOCKING OF 900 SERVICE

1. Technical Feasibility of Blocking

44. *Proposal.* The *NPRM* provided that LECs must offer to their subscribers, where technically feasible, an option to block all interstate 900 services.

45. *Comments.* The comments are overwhelmingly in favor of our proposal to require LECs to block interstate 900 services upon the subscriber's request.[73] There is significant comment, however, about what the phrase "technically feasible" means and how it should be applied.[74] In general, the comments state that older electromechanical switches are incapable of blocking calls to the 900 exchange on an individual subscriber basis and that software changes or generic updates will be necessary in some stored program control switches to accomplish that blocking.[75] USTA recommends that we define blocking of 900 services to be "technically feasible" when it "can be achieved without significant new capital investment, and where any expense incurred is modest and would not affect a carrier's established network planning and deployment processes."[76] Some information providers see the availability of voluntary blocking as a way to ensure that only the consumers who want information services have access to them.[77] The IXCs and LECs generally see voluntary blocking as a way of reducing complaints and consumer dissatisfaction.[78]

46. *Decision.* We adopt a rule requiring that LECs offer to subscribers the option to block all services on the 900 exchange where technically feasible. The record demonstrates overwhelming support for blocking as a means of giving consumers a measure of control over their exposure, and the exposure of children especially, to information services and the unexpected charges that can be incurred through the improper use of the services. In defining "technically feasible", we balance both technical and economic considerations with a view toward providing blocking capability to consumers without imposing undue economic burdens on LECs. This rule will impose an obligation on LECs to provide subscribers, both residential and commercial, with the option to request blocking of 900 service where the existing switch will accommodate it. We are not requiring that LECs accelerate their purchases of new equipment. Rather, the LEC must, when existing equipment is capable of providing blocking for 900 services, provide blocking. Also, we clarify that, in light of the technical difficulties which LECs would encounter in blocking non-900 pay-per-call services, we are only requiring the LECs to provide blocking for pay-per-call services on the 900 exchange.

2. Blocking of 900 Services for Residential Subscribers

47. *Proposal.* The proposed rule requires that blocking shall be free on a one-time basis for all residential subscribers. The *NPRM*, however, invited comment on whether free blocking should only be available to subscribers who are in one of three categories: (1) subscribers for an initial period of time when the blocking service is first made available; (2) new subscribers when they first obtain service; and (3) subscribers who dispute or question a 900 service charge for the first time.

48. *Comments.* First, the comments generally favor free blocking for residential subscribers during an initial introductory period and when they first obtain service.[79] There were many favorable comments on also making

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[72] We clarify that the rule is not intended to require that the carrier keep track of the ownership of an information provider's accounts receivable and provide identifying information about the current owner. *See* Comments of MCI at 4-5. While the Commission recognizes that factoring of receivables is a common practice in the 900 industry, the record shows that it is typically done on a recourse basis so that ownership of unpaid receivables would typically return to the information provider. In any event, the intent of the rule is to make the information provider accessible to the public and to public agencies. Requiring the carrier to disclose identifying information about "any other entity to whom the caller might be responsible for paying the 900 service charge" was not meant to require the carriers to track and disclose identifying information about entities acting as factors of 900 services accounts receivable. Rather, that requirement was to allow the consumer and his or her representatives to identify and contact the entity legally responsible for a 900 services program, even if the information provider had a unique organizational structure or actively tried to conceal its identity. However, in response to the commenters' suggestion, we delete that language from the final rule.

[73] *E.g.*, Comments of AIPNY at 10 (free customer-initiated blocking adopted in New York in April 1988; 250,000 customers have blocked 900, substantially reducing complaints); Comments of Conn. AG at 10 (decrease in state complaints occurred after blocking was instituted).

[74] Comments of TCI at 2 (LECs could add blocking capability for $40 per line in areas where it currently is not technically feasible); Comments of USTA at 7-8 (defines "technically feasible" to include cost considerations).

[75] Reply Comments of Ameritech at 4.

[76] Comments of USTA at 8; *see also* Reply Comments of Centel at 5 (agrees with USTA).

[77] Comments of Teleline at 6.

[78] Comments of Centel at 8; Comments of MCI at 5; Comments of Telesphere at 17.

[79] *E.g.*, Comments of Ameritech at 2 (has offered to all their subscribers the ability to block, without charge, calls to 900 numbers for almost three years; already satisfies the *NPRM* categories except that it charges the second time that a consumer requests blocking); Comments of MPSC at 6 (supports our proposals for blocking, the three exceptions, the one-time charge and no monthly fee); Comments of NYSDPS at 6,7 (free blocking should be offered unconditionally and on request at any time; no evidence at state level that residential customers have taken advantage of the free system by making repeated requests for blocking).

free blocking available when a subscriber first disputes or questions a 900 service charge, but this category also stimulated the most negative comments.[80] In addition, there was a significant amount of general criticism of the *NPRM*'s proposal to restrict free blocking to specific categories of customers. Rep. Gordon and Consumer Action both advocate that blocking be available at no charge in perpetuity.[81] Several commenters state that because the information providers, IXCs and LECs added the capability to make 900 service calls via the telephone network, and blocking merely restores consumers to the situation that they were in before 900 service was added to the network, subscribers should not have to pay to return to the status quo ante.[82] The Wisconsin PSC states that it has been their experience that minor children or other persons may impersonate the subscriber and request that a block be removed. It argues that blocking will be a less effective consumer protection measure unless we require safeguards against unauthorized removal of 900 blocking.[83]

49. *Decision.* We are persuaded that it is in the public interest to require free blocking on a one-time basis for residential subscribers. Most states have required some form of free blocking of 900 services and the rule we adopt today will merely make uniform the standard that most states have found to be in the public interest when considering the matter. We are persuaded that the better rule is to require that each residential subscriber be offered one opportunity to block 900 services upon request and at no charge. The LEC should, however, be able to charge residential subscribers a reasonable one-time fee for each subsequent request to unblock or re-block after he or she has been given one free block.[84] Residential subscribers obtaining service at a new location, however, should be able to have free blocking of 900 services, even if they have previously exercised their one free option to block those services elsewhere.[85] We hereby adopt Wisconsin's suggestion that requests to remove 900 blocking must be in writing.

3. Blocking for Commercial Subscribers

50. *Proposal.* The *NPRM* also requested comment on whether blocking should be available at no charge to commercial, as well as residential, subscribers.

51. *Comments.* Comments are mixed on this issue.[86] Pac line in California[87] and a small hotel in Maryland encloses a quotation from a LEC showing one-time charges of over $600, plus continuing monthly charges, for blocking of 900 services.[88] Generally, LECs advocate that commercial subscribers be charged for blocking.[89] NYNEX provides three reasons for imposing blocking charges on business customers: (1) businesses have an interest in blocking 900 to keep their employees from running up charges, and there is no reason for other ratepayers to subsidize them; (2) businesses are able to pass those costs on to customers; and (3) businesses may have the alternative of blocking 900 calls through their customer premises equipment.[90]

52. *Decision.* Many businesses have the ability in their equipment to block 900 services. A blocking fee will encourage them to use that capability and avoid imposing costs on the LECs. We are not persuaded that the costs of blocking should be shifted away from businesses. We thus conclude that LECs should be able to recover some of the costs of blocking by imposing reasonable one-time charges on commercial subscribers. Therefore, we will limit our requirement of one-time free blocking to residential subscribers. We require carriers to offer the service to commercial subscribers but will not dictate charges, except to require that the charges be one-time and reasonable.

4. Technical Problems of Blocking

53. *Proposal.* The *NPRM* also sought comment on the technical problems that the providers of 900 services might encounter in blocking such calls.

54. *Comments.* Comments about technical problems associated with blocking center primarily around proposals by the information providers that the LECs should be required to offer individual subscribers the capability of blocking 900 services on a number-specific, program-by-

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[80] *E.g.*, Comments of Bell Atlantic at 2 (free blocking should not be provided during first dispute because consumers have already had opportunity to get blocking; costs should not be incurred to give them a second chance); Comments of Cin. Bell at 2 (administratively difficult to tell whether it is first time a subscriber has disputed charges); Comments of Conn. AG at 11 (problem with blocking is that it is not requested until there is a dispute); Comments of IT at 13 (opposes allowing subscribers who dispute or question a 900 service charge for the first time to have free blocking; they have missed their chance); Comments of USTA at 7-8 (ill-advised; should stick to the general rule that the customer is responsible for calls made from his telephone).

[81] Reply Comments of Consumer Action at 4; Comments of Rep. Gordon at 5.

[82] Comments of Attorney General Humphrey at 35-36; Comments of NYCDT at 8-9.

[83] Comments of WI PSC at 4.

[84] Our "one free block" requirement is a limited exception to our policy that the subscriber who causes a cost should bear responsibility for payment thereof.

[85] In situations in which the *NPRM* would permit the LECs to charge for blocking, we tentatively concluded that the LECs should be able to charge a reasonable one-time fee for blocking interstate 900 services but not be able to impose a monthly service fee for such blocking. The comments on this issue supported our tentative proposal that no monthly fees should be allowed for blocking. *E.g.*, Comments of MPSC at 6. Therefore, we adopt the proposal in the *NPRM* that, to the extent that LECs can charge fees for blocking, they may charge a reasonable, one-time fee and may not charge any subscriber monthly fees for blocking.

[86] Comments of NYCDT at 4 (has spent over $1,000,000 on blocking of 900 services); Comments of Coalition at 8 (extend free blocking to commercial subscribers); Comments of GTE at 3 (should apply to residential and business subscribers); Comments of Pac Tel at 4 (gives costs it charges businesses for blocking); Comments of Bell Atlantic at 2 (should not be free to commercial); Comments of Conn. AG at 10-11 (Conn. offers free blocking for three-month initial period for all business customers; after July 4, 1990, a $57 one-time fee); Comments of Attorney General Humphrey at 34 (should be free to commercial subscribers; currently available in Minnesota free of charge on a one-time basis whenever requested).

[87] Comments of Pac Tel at 4.

[88] Comments of Manor at 2.

[89] *E.g.*, Comments of Bell Atlantic at 2; Comments of NYNEX at 4-5; Comments of PacTel at 4.

[90] Comments of NYNEX at 4-5.

program basis.[91] The LECs oppose these proposals, arguing that such a requirement is not economically or technically feasible.[92]

55. *Decision.* The commenters have convinced us that the practical difficulties and economic burden of effectively blocking a dynamic and constantly changing list of 900 services information programs outweigh any benefit that this capability would offer to consumers. Moreover, it is not clear that there is considerable demand from consumers for number-specific blocking of 900 services. Further, we are averse, under these circumstances, to imposing requirements on technologies that are neither installed nor fully developed and are wary of foreclosing other, perhaps more beneficial, applications for the resources required to provide number-specific blocking. Therefore, we conclude that it would not be in the public interest to order LECs to offer number-specific blocking of 900 services at this time.

5. Recovery of Costs of "Free" Blocking

56. The *NPRM* invited comment on how the costs of providing blocking service should be recovered.

57. *Comments.* Commenters suggest a variety of approaches for recovering the costs of blocking.[93] Cincinnati Bell states that the costs of implementing any service must either be recovered in a discrete rate element or otherwise such costs will go into the rate base and be recovered from all subscribers. It states that, in this instance, the costs would be allocated as intrastate because the blocking is done on the local side of the switch.[94] Other suggestions for dealing with the costs of "free" blocking range from imposing a surcharge on 900 access,[95] imposing other charges on the IXCs and information providers,[96] referring the separations implications of blocking to the Federal-State Joint Board in Docket No. 80-286 while adopting Part 69 rules to recover the interstate access costs,[97] or adding a new Part 32 account to implement the recovery of the proper expenses.[98]

58. *Decision.* We will not alter the manner in which the LECs recover the costs incurred in blocking 900 calls at this time. The record indicates that where blocking is available, LECs recover those costs from IXCs,[99] or from subscribers who do pay a blocking fee, or from ratepayers generally.[100] Accordingly, certain costs incurred in providing the one-time free (to the subscriber) blocking required herein will be recovered through state-mandated procedures.[101] We decline to require that blocking costs be recovered solely through an interstate access tariff charge. First, as noted, there is no evidence that the costs of blocking are significant and many states have ordered or allowed one-time free blocking. Thus, our efforts to alter the cost recovery of this service would disrupt existing state procedures that, based on this record, apparently work satisfactorily. Also, the record shows that the costs incurred in blocking are recorded in Accounts 6623 - Customer Service Expense and 6210 - Central Office Switching Expense.[102] A portion of those costs are assigned to the interstate jurisdiction by our Part 36 Rules and are now spread among the access elements,[103] and other costs are assigned to the intrastate jurisdiction. This allocation properly reflects that blocking affects both interstate and intrastate pay-per-call services. The record does not justify making any Part 36 changes that would be required if we were to change the current methodology for recovering blocking costs. Finally, we observe that recovery of all costs of the free blocking of 900 services for residential subscribers at the federal level, with cost recovery of other blocking pursuant to state procedures, would inject undue complexity into the LECs' accounting for these costs.[104]

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[91] Comments of ANPA at 6; Comments of Amrigon at 12; Comments of DMA at 13; Comments of KAOS at 7.

[92] Comments of USTA at 7-8 (technical constraints require blocking all 900 programs or none); Reply Comments of Ameritech at 4 (number specific blocking is not technically feasible in electromechanical or analog stored program control switches; could be accomplished with digital stored program control switches, but only with complex and extensive screening tables).

[93] Comments of BellSouth at 2 n. 2 (charges fee to residential subscribers for 900 blocking in three of the nine states it serves: Florida, $10 onetime; Georgia, $5 one-time, and South Carolina, $5 one-time); Reply Comments of BellSouth at 2-3 (should recover costs through reasonable one-time charges on end-users).

[94] Comments of Cin. Bell at 3.

[95] Comments of Bell Atlantic at 2-3.

[96] Comments of GTE at 3.

[97] Comments of ME PUC at 2; *see also* Comments of NTCA at 2-3.

[98] Comments of MCI at 5-6; *but see* Reply Comments of GTE at 6 (opposes MCI's request to modify the Uniform System Of Accounts (USOA) as expensive and unnecessary; says that the USOA is flexible enough to accommodate new services and special costs without requiring USOA modification).

[99] Comments of Attorney General Humphrey, Attachment I, at 2, Letter from R.C. Fuehr to Dennis Alhers (February 8, 1990) ("[c]osts for making 900 blocking available will be assigned... to the Local Switching element of the Minnesota Access Service Tariff.... We... believe that there should be little, if any, effect on the general ratepayer caused by handling the costs in this way.")

[100] Comments of Cal. PUC at 4-5; Comments of IURC at 5-6; Comments of Ohio PUC at 5; Comments of PA PUC at 2, 7-8; Comments of SW Bell at 5; Comments of WI PSC at 3-4.

[101] There is no record evidence that the costs of one-time blocking are significant, or that our requirement mandates any change in the price caps of current carriers under that regulatory program. Thus, we do not need to consider such costs to be exogenous. Moreover, since blocking already is widespread, those expenses are already reflected in the productivity factor used in the LEC's Price Cap Index formula. Also, we note that a recent NARUC survey showed that free one-time blocking is already in effect in thirty-one states. National Association of Regulatory Utility Commissioners, A NARUC Overview of Dial-It 976 and Dial-It 900, at 99 (April 24, 1991).

[102] Letter from Fred K. Konrad, Director-Federal Relations for Ameritech, to Donna R. Searcy, Secretary of the Federal Communications Commission (August 13, 1991).

[103] *Id.*

[104] We deny MCI's request that the Commission create a new account in the USOA to record the costs of blocking 900 calls. MCI does not show that the variety of tasks required to perform the blocking function can be discretely identified so as to be isolated and recorded in a single account. For example, the service order may be taken as part of the subscriber's initial order for overall service, which may encompass a number of other functions performed by the business office staff.

6. Involuntary Blocking by Common Carriers

59. *Proposal.* An issue that was not addressed specifically in the *NPRM*, but which many commenters raise, is whether carriers and information providers should be allowed to block subscribers, without their consent, from receiving 900 services because of their previous failure to pay for those services.

60. *Comments.* Certain commenters argue that involuntary blocking of 900 services should be available if the subscriber repeatedly makes 900 telephone calls and refuses to pay for them.[105] There is some disagreement among the commenters about what guidelines would limit the right to block a subscriber's 900 service involuntarily.[106] As an alternative, one information provider states that it is developing a database that would allow the information provider to screen incoming calls and reject those from telephones with a previous history of non-payment for its programs.[107] Other concerns are that involuntary blocking of 900 services could result in the denial of a subscriber's access to tariffed 900 services provided by AT&T and that the involuntary blocking issue could be beyond the scope of this proceeding.[108]

61. *Decision.* We are not taking any action at the federal level regarding such involuntary blocking at this time. We note that some states have procedures in place to place involuntary blocks on consumers who fail to pay for such services. No case has been made that these state statutes or regulations undercut any federal policy.

D. SECTION 64.714 - RESTRICTIONS ON DISCONNECTION OF BASIC COMMUNICATIONS SERVICE

62. *Proposal.* A rule proposed in the *NPRM* would prohibit common carriers from disconnecting or ordering the disconnection of a residential or commercial telephone subscriber's "basic communications service" because of that subscriber's failure to pay interstate 900 service charges. The *NPRM* clarifies that "basic communications service" includes both basic exchange service and interexchange services.

63. *Comments.* Many LECs, IXCs and information providers support our proposal.[109] Government and consumer agencies overwhelmingly support it.[110] USTA files negative comments, stating that this rule would force its members to change their billing systems and cannot be implemented under current billing systems.[111]

64. *Decision.* The record overwhelmingly supports the adoption of the rule as proposed in the *NPRM*, and we adopt that rule, subject to the modifications made pursuant to paragraph 82, *infra*. We note the comments of USTA about the difficulty that some LECs may have in implementing this requirement but conclude that the public interest in protecting basic service for subscribers outweighs that concern. We also note that restrictions on disconnection for failure to pay for 900 services are already required by the Commission for AT&T and have been imposed by many states.[112]

E. OTHER ISSUES

1. Terms and Conditions Regarding Quality

65. *Proposal.* The *NPRM* requested comments on whether information providers were deliberately providing poor quality programming to keep callers on the line longer or stimulate additional calls, thereby raising their revenues. The *NPRM* noted that consumers have complained about being disconnected from a 900 service before the call was completed, or having to listen to an audio program with low volume or in which the instructions were given very rapidly. These practices make the consumer call again or stay on the line longer, in either case incurring further charges. The *NPRM* requested comments on whether such practices occur and the extent to which the Commission should impose requirements directed at preventing such problems.

66. *Comments.* The commenters generally provide little specific evidence that such practices are widespread, although they frequently comment that such practices are reprehensible and should be prohibited.[113]

67. *Decision.* Because the practices under consideration here are very diverse and because there is no significant record indicating that poor quality programs are other than sporadic, we will not adopt a separate, specific rule on quality for pay-per-call services. But we do believe that the record supports modifying proposed §64.711 to re-

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[105] *E.g.*, Comments of Bell Atlantic at 3 (should allow blocking by LECs of customer who repeatedly refuses to pay after blocking made available); Reply Comments of Consumer Action at 4 (conditionally supports the concept that carriers be able to block customer's access to some or all 900 programs for customers who repeatedly fail to remit for such services; blocking should only be permitted if the information provider can prove customer abuse); Comments of IIA at 35 (information providers should be able to block when there is a "persistent pattern of abuse" of the 900 services).

[106] Comments of AIPNY at 10 (LECs automatically block 900 in New York after two write-offs); Comments of Centel at 6-7 (LECs should be allowed to block 900 for consumers who repeatedly fail to pay charges; standards could be that blocking would be imposed after charge is thoroughly investigated or after third such dispute); Reply Comments of Consumer Action at 4 (should only be permitted if the information provider can prove customer abuse).

[107] Comments of IT at Attachment A.

[108] AT&T also argues that since some of its 900 services are provided on a tariffed basis, pursuant to the Bureau's order in AT&T 900 Dial-It Services and Third Party Billing and Collections Services, 4 FCC Rcd 3429 (Com.Car.Bur. 1989) (*AT&T 900 Dial-It Order*), the involuntary blocking of 900 services would result in the effective disconnection of that customer from AT&T's tariffed 900 services. AT&T objects to deciding this issue herein because it is outside the scope of the proceeding. Reply Comments of AT&T at 13.

[109] *E.g.*, Comments of AT&T at 9 (would substantially codify Commission's order in *AT&T 900 Dial-It Order* and is in accord with longstanding AT&T policies and procedures); Comments of PPI at 6, 10 (should impose a national uniform policy prohibiting the disconnection of basic services for failure to remit pay-per-call charges); Comments of Pac Tel at 4 (does not object to disconnection rule; it is consistent with company's current policy).

[110] *E.g.*, Comments of Conn. AG at 19; Comments of NASUCA at 17 (supports no-disconnect rule).

[111] Comments of USTA at 8.

[112] *AT&T 900 Dial-It Order*, *supra*, n. 105; Comments of Cal. PUC at 5.

[113] Comments of SW Bell at 4 (should require information providers to ensure quality of recording); Comments of IIA at 32 (if practices are deliberate, they are unfair and unscrupulous); Comments of NAAG at 14 (based on complaints they receive, poor quality practices do occur).

quire that the preambles are "clearly understandable and audible." This requirement will eliminate preambles that are too fast or have low or poor audio quality, thereby ensuring that the consumer will have a reasonable opportunity to understand the nature of the program and make an informed decision about it. Quality problems that affect the content of or charges for the program may be dealt with by the FTC or state agencies with jurisdiction over deceptive practices.

2. Automated Collect Calls

68. *Proposal.* The *NPRM* also requested comments on the practice of placing automated calls to consumers and then billing them for a 900 services charge. The *NPRM* described two variations of this technique, each of which required some action or lack of action on the part of the consumer to indicate acceptance of the call.

69. *Comments.* NASUCA describes a situation in Colorado during which thousands of consumers were telephoned and, unless they pushed 0 on a touchtone phone to reject the call, were charged approximately $3.85 each. The comments state that many subscribers were charged when their answering machines answered the call or when persons just hung up their telephones without pushing 0.[114] Other consumers in Maine were charged for automated collect calls.[115] Numerous other parties, including many information providers, comment on the practice of automated collect calls and the comments are largely in support of imposing restrictions on this practice.[116]

70. *Decision.* The Commission is persuaded that a rule banning certain pay-per-call automated collect calls should be adopted. The rule will prohibit common carriers from providing transmission services for pay-per-call programs which initiate calls to consumers unless the party who is called has to take action that affirmatively demonstrates a desire to accept the collect call. Without such a rule, this practice has great potential for harm to consumers who may be charged unknowingly for an unwanted telephone call that they did not initiate.

3. Line Seizing

71. *Proposal.* The *NPRM* requested comments on the phenomenon of "line seizing" by autodialers, *i. e.*, calls from automated dialers that may remain on the line long after the consumer has attempted to disconnect the call. We stated that several manufacturers of autodialers had denied that this was a problem, claiming that newer equipment disconnects immediately upon receiving a disconnect signal from the called party. The *NPRM* noted that equipment manufacturers and telephone companies allege that line seizing ends within 10 to 25 seconds after the called party hangs up.

72. *Comments.* The comments are divided on the issue of whether line seizing is a problem. NACAA and the Michigan PSC, among others, contend that it is a problem.[117] On the other hand, some commenters advocate caution in dealing with the issue of line seizure.[118] In addition, the DMA argues that autodialers are used for many purposes other than soliciting for 900 services and that this issue should be considered in a separate proceeding because it is not primarily related to 900 services.[119] The DMA argues that the line seizure problem raised in the *NPRM* is confined to one type of autodialer technology, equipment that uses recorded messages in telemarketing solicitations. Technical publications indicate that regardless of the technical characteristics of the autodialer equipment, the network will disconnect within 11 seconds for most electronic switches and within 37 seconds for most electromechanical switches still in use in the network.[120]

73. *Decision.* The comments persuade us that there is a problem with line seizure by autodialers in some situations, specifically with autodialers that deliver recorded messages and are used for outbound telemarketing. Various states have already enacted restrictions of their own.[121] We have determined that this Commission should adopt a rule applicable nationwide requiring prompt disconnection of such calls. However, we will not require a set amount of time because the ability of the network to

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[114] Comments of NASUCA at 24.

[115] Comments of the ME PUC at 2 and Appendix B.

[116] *E.g.*, Comments of COAC at 9 (supports rules banning; appropriate preventative equipment may solve the problems); Comments of Talisman at 3 (should be prohibited); Comments of United at 7 (would not oppose regulation); Comments of SW Bell at 5 (ban unless customer can refuse to take the telephone call); Comments of Conn. AG at 16 (approves of regulation on automated collect calls); Comments of PPI at 9 (should be prohibited).

[117] *E.g.*, Comments of NACAA at 7 (line seizing is a problem, says its member agencies have reported problems; worst are when fire stations, police stations and hospitals lose access to their telephone lines because of line seizure); Comments of MPSC at 5 (one-third of complaints about autodialers allege line-seizing); *see also* Comments of Attorney General Humphrey at 18. (hospital in Minneapolis had lines tied up); Comments of IURC at 5 (problem of line seizing occurs primarily in older, mechanical central offices that are configured to allow calling party hold; in central offices with newer analog and digital technologies, the called party's central office equipment disconnects the call after receiving the called party disconnect signal; the disconnection is accomplished regardless of whether or not the autodialer disengages); Comments of PPI at 9 (ban line seizing); Comments of Conn. AG at 17 (several complaints have been received in Connecticut); Reply Comments of TPUC at 4 (should adopt rule on line seizure); Reply Comments of IA UB at 8 (should adopt rule requiring equipment to prevent line seizure). *But see* Comments of PA PUC at 7 (line seizing not a problem in Pennsylvania so far).

[118] *E.g.*, Comments of COAC at 9 (not aware that line seizing is a problem; supports rule but argues against broad-gauged approach which may do more harm than good).

[119] Comments of DMA at 14-15 (also asserts that the *NPRM* mischaracterizes nature of the problem by implying that it applies to all autodialers when it really only arises with autodialers that use a prerecorded message for outbound telemarketing); *see also* Comments of IIA at 33 (do not ban line seizure in this proceeding because it is not related to 900 services; have a separate proceeding if necessary).

[120] Network Planning Central Services Organization, Notes on the BOC Intra-Lata Networks at 26, Table D (1983); Bellcore, Lata Switching System Generic Requirements at 6.3-15 (July 1987) (procurement standard for Bell operating companies requires switching equipment to disconnect 10 to 12 seconds after the called party hangs up). The relevant portions of these documents have been included in the record herein.

[121] *See* Reply Comments of TPUC at 4 (state law requires autodialer to disconnect not later than ten seconds after the called person hangs up; bill pending in legislature would extend that to thirty seconds); Comments of NYSDPS at 5 (New York law requires that automatic dialers must disconnect from tele-

disconnect calls after the called party hangs up differs according to the type of equipment. We are not requiring network upgrades to ensure compliance with this rule. Rather, autodialers which deliver a recorded message must use current capabilities to disconnect as promptly as is possible.

4. Dispute Resolution

74. *Proposal.* The *NPRM* requested comments on what industry practices govern consumer dispute resolution and whether such practices are adequate or effective in resolving consumer disputes.

75. *Comments.* Industry commenters generally argue that their existing policies are adequate and that Commission action is not necessary.[122] Government and consumer commenters generally advocate the adoption of specific refund requirements or complaint handling procedures.[123]

76. *Decision.* We are not preempting state policies or rules concerning dispute resolution in this order. Moreover, we find that, in light of the other actions we have taken to inform and protect consumers, the adoption of detailed federal dispute resolution procedures is unnecessary at the present time. The prohibition on disconnection of basic communications service will require information providers or carriers to pursue the collection of disputed 900 service charges, to the extent that they choose to do so, as private commercial disputes for which rules already exist. We find that the other rules adopted herein provide adequate protection to consumers to ensure that the abuses of the 900 services are deterred. Accordingly, we decline to mandate dispute resolution procedures. To the extent that state procedures do not thwart or impede the federal policies that we adopt herein, parties will also have those means to resolve 900 service disputes.

5. Dual-Tone, Multi-Frequency Tones

77. *Proposal.* The *NPRM* requested information on the practice of using a television program to generate the tones necessary to complete a call to a 900 service program. The *NPRM* asked how widespread the practice is, how it is accomplished technically and whether it would be in the public interest to prohibit or restrict such practices in interstate commerce.[124]

78. *Comments.* There are very few comments on this issue, and those parties who comment support a ban on the practice.[125] There is no record that this is a current practice, but the commenters almost universally state that there is no justification for it and that a ban would not harm legitimate businesses.

79. *Decision.* We find that this practice has significant potential, if unchecked, to harm consumers, especially children too young to understand the concept that placing a call can involve a charge. Obviously, such a practice is aimed at the very youngest members of a family, those who are unable to write down and use a eleven-digit dialing sequence. Therefore, we prohibit carriers from providing transmission service to any pay-per-call program that employs tones generated in advertising to complete a call to the pay-per-call program.

F. SCOPE OF REGULATIONS

80. *Proposal.* The *NPRM* requested comments on whether these rules should extend beyond interstate 900 services to apply to other exchanges, such as 700, 976 or 540, on which interstate pay-per-call services are offered.

81. *Comments.* The comments overwhelmingly support the position that our rules should apply to all interstate pay-percall services, regardless of which exchange they are offered on. Some commenters object to the extension of jurisdiction over specific exchanges, such as 976, on the ground that interstate traffic is blocked from reaching those numbers.[126] Other commenters raise concerns about the impact of applying these rules to other exchanges, such as 700, 800, 976 or 540;[127] the IXCs are concerned about the implications for other, non-pay-per-call services that they offer on, for example, the 700 exchange.[128] The LECs also express concern about the difficulty that they would have in blocking or applying the disconnection rules to pay-per-call services offered over 700 or some other exchange.

82. *Decision.* We agree that these rules should be modified to provide that these restrictions apply to all interstate pay-per-call services. Therefore, we are adding Section 64.709, 47 C.F.R. § 64.709, to define the term "pay-percall" services. The definition is intended to include all interstate information services offered on a transactional basis, except as otherwise noted herein. Under the rule, calls will be considered "complet[ed]" when charges are assessed, not when the entire information program has been provided. Presubscribed services, such as legal research services or other databases, are not required to comply with these rules because the consumer had an adequate opportunity to obtain information about the costs and benefits of the service at the time of presubscription. Collect information calls, to the extent they are permitted by these rules, are included in the definition of "pay-per-call" services. When a consumer takes affirmative action clearly indicating that it accepts such charges for such a collect call, the consumer's action changes him or her from the called party to the calling party for the purposes of this rule.

83. We are changing all but one of the rules to apply to interstate pay-per-call, rather than just 900, services. Section 64.713 will be unchanged and continue to require that the LECs only be responsible for blocking interstate

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phone line upon termination of the call by either party); Comments of Attorney General Humphrey at 18 (Minnesota has statute requiring disconnection within ten seconds).

[122] *E.g.*, Comments of DMA at 4, 9-10; Comments of MCI at 7.

[123] *E.g.*, Comments of MPUC at 9; Comments of NASUCA at 22-23; Comments of Rep. Gordon at 6.

[124] *NPRM*, 6 FCC Rcd at 1859.

[125] Comments of COAC at 9; Comments of PPI at 9; Comments of NASUCA at 11.

[126] Comments of United at 8-9.

[127] Comments of MPSC at 9 (would like to see 800 prefix remain free to caller; but if it is used for pay-per-call, should be covered by the rules); Comments of Ameritech at 2-3 (uses 540 NXX to provide local exchange service); Comments of SW Bell at 5-8 (opposed to including other prefixes).

[128] Reply Comments of AT&T at 13-15; Comments of MCI at 2, n. 1.

900 calls because the LECs would encounter serious difficulties in blocking pay-per-call services on other exchanges. The fact that the rules are only applicable to interstate services should eliminate concerns about 976, 540 and other local services to the extent that they either do not carry pay-per-call services or do not allow interstate traffic to access them. Further, because the rules are limited to pay-per-call services, business services not offered on a pay-per-call basis will not be required to have a preamble. The 900 service is designed to accommodate interstate pay-per-call services; other exchanges are less suitable for such services.[129] Many commenters mention that unless the rules apply to all pay-per-call services, there will be a tendency for services to migrate away from the 900 exchange in search of more lenient regulatory treatment. In adopting the modified rule, we are eliminating the opportunity for pay-per-call services to avoid regulation by moving to other exchanges. The 900 exchange has all the attributes necessary for the provision of information services to the public, and the record shows no valid technical or legal reason why the public would be better served by allowing interstate pay-per-call services to be free of regulation simply because they are on an exchange other than 900.

G. STATE REGULATION OF 900 SERVICES

84. The record in this proceeding demonstrates that there is both interstate and intrastate 900 services traffic. California has authorized a 900 service intended to originate and terminate within its boundaries.[130] The record further shows that the switches of the LECs are not capable of differentiating between interstate and intrastate 900 traffic.[131] Commenters agree that most 900 calls are interstate.[132]

85. State legislatures and public utilities commissions have taken many actions designed to protect their citizens against abusive and deceptive practices by marketers which are potentially applicable to pay-per-call service.[133] Some of the state requirements, however, are inconsistent with each other and with the federal requirements adopted in this *Report and Order*.[134] However, interstate and intrastate pay-per-call 900 services must both use the same facilities and a single, nationwide number. With present technology, carriers are unable to jurisdictionally identify and apply different state and federal preamble requirements. The record establishes that neither the local exchange carriers,[135] interexchange carriers,[136] nor information providers[137] will know whether the call is intrastate and thus within the state's jurisdiction.

86. In view of the foregoing characteristics of 900 pay-per-call services, we conclude that we must preempt stateimposed preamble requirements.[138] State efforts to impose preamble requirements on interstate pay-per-call service must be preempted to the extent that they would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[139] The objective of Congress involved in the present proceeding is our Title I obligation to "make available... a rapid, efficient, Nation-wide... communications service...."[140] We believe that state requirements that additional or different material be presented in the preambles for a pay-per-call service will present such an obstacle to our Title I responsibilities because the state required pre-

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[129] For example, 976 exchanges are designed to offer intrastate pay-per-call services and, because LECs and IXCs have typically not worked out arrangements to bill for interstate calls, IXCs frequently block interstate access to 976 and other local pay-per-call exchanges. *See* Comments of Coalition at 7. 700 exchanges can be used for any purpose designated by the carrier but, unlike the 900 exchange, a caller can generally only access 700 services offered by his or her own IXC or by dialing a 10XXX access code. Therefore, 700 exchanges lack the ability to conveniently and universally market an information service. Reply Comments of NAIS at 8-9; Comments of Attorney General Humphrey, Attachment I, at 2, Letter dated February 8, 1990 from R.C. Fuehr, Vice President of U.S. West Communications, to Dennis Ahlers, Assistant Attorney General of Minnesota (Allnet is only carrier offering pay-per-call on the 700 exchange, and it provides blocking).

[130] Comments of Cal. PUC at 1-2.

[131] Comments of BellSouth at 1; Comments of Centel at 6 (any rule adopted for blocking of 900 services will necessarily affect the provision of both interstate and intrastate 900 services, because the LECs' central office switches are unable to distinguish between the two); Comments of Pac Tel at 4 (the local exchange carrier does not have the information needed to determine the destination of a 900 service call, it cannot distinguish between interstate 900 calls and intrastate 900 calls); Comments of GTE at 4 (once a call is extended to the IXC, the LEC has no knowledge of whether its termination point is intrastate or interstate and no way to block the call based on the point of termination).

[132] *E.g.*, Reply Comments of Telesphere at 5.

[133] *E.g.*, Comments of Cal. PUC at 1-6; Comments of VA AG at Attachment 1.

[134] Comments of IURC at 3 (has established an exception to the preamble requirement for intrastate calls costing $1.50 or less); Comments of Cal. PUC at 3 (requires preamble to disclose the date the information was recorded); Comments of VA AG at Attachment 1 (Virginia law requires preambles containing information provider address and requires billing from the time of the initial connection if the caller stays on the line after the delayed timing period).

[135] *See* n. 131, *supra*.

[136] Reply Comments of Telesphere at 4 (technically impossible to separate intrastate from interstate calling); Comments of Cal. PUC, Attachment at 106 (in a proceeding considering separation of interlata and intralata 900 traffic, evidence showed that IXCs cannot tell the location of the call origination, only that it has been received at their point of presence).

[137] Comments of Telesphere at 27 (most IPs and service bureaus are technically unable to segregate the few intrastate 900 calls from the many interstate 900 calls today on a real time basis); Comments of Audio Communications, Inc. at 20 (would be extremely difficult, both practically and technically, to separate intrastate and interstate 900 calls).

[138] Accordingly, we disagree with NARUC's request that we not preempt any state actions that impose greater restrictions on 900 services than do our rules. Comments of NARUC at 5, 10. However, to the extent that there are 900 or other pay-per-call services which may be accessed only on an intrastate basis, state regulation would appear not to be inappropriate.

[139] *See* Operator Services Providers of America, Petition for Expedited Declaratory Ruling, 6 FCC Rcd. 4475, 4478 (1991) (*OSP Order*) *citing* City of New York v. FCC,486 U.S. 57 (1988)*et al.* The circumstances under which we may preempt state authority over intrastate communications are set forth in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

[140] 47 U.S.C. Section 151.

amble material would either have to be provided on both intra- and interstate calls, or carriers and information providers would have to develop and install technical means to identify inter- and intrastate traffic and apply different preambles. If the state preamble requirements were imposed on all calls, that action would impose a greater burden and would result in a different balance of interests than the federal requirements would impose. If different preambles could be applied to pay-per-call service that can be accessed on both an intrastate and interstate basis, the state requirements would result in wasteful and inefficient duplication of resources. The preamble requirement adopted herein is meant to establish a nationwide standard for educating consumers about the nature of the call being placed, and conflicting or additional state requirements would cause undue confusion and expense to all parties. In the present case, the same network and customer premises equipment processes both interstate and intrastate pay-per-call services. We believe that this preemption must encompass state-imposed preamble requirements purportedly limited to intrastate 900 services because, in the absence of the LECs', IXCs' or information providers' ability to identify intrastate 900 calls, effectuation of the state preamble requirement would necessarily require application of the state requirements to interstate 900 service.[141] Therefore, we conclude that such state requirements would thwart or impede the federal policy and the balance that we have struck herein. *See California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

87. There are blocking and disconnection practices in which the states have a legitimate interest, and which now appear not to impinge upon our jurisdiction to regulate interstate communications. We do not foreclose such regulation, and do not preempt any such requirement at this time, because it appears that the state activity does not create a conflict with the policies we establish herein.[142]

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

88. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

89. **Need and purpose of this action.** This *Report and Order* adopts regulations to protect consumers against unfair and deceptive practices which have occurred in the pay-per-call industry and to provide them with the information they need to make an informed purchase decision about these services.

90. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis.** No comments were submitted in response to the Initial Regulatory Flexibility Analysis.

91. **Significant alternatives considered and rejected.** The initiating documents in this proceeding offered many proposals. The commenters supported the basic thrust of this proceeding but many suggested alternatives to the Commission's proposals. The Commission considered all of the alternatives presented in the proceeding and considered all of the timely filed comments directed to the various issues that were raised. After carefully weighing all aspects of the issues and comments in this proceeding, the Commission has taken the most reasonable course of action to protect consumers against unfair and deceptive practices in the pay-per-call industry and provide consumers with the information they need to make informed purchase decisions about these services.

V. CONCLUSION

92. With this *Report and Order*, we adopt rules that will facilitate consumer choice by requiring disclosure, in a clearly understandable and audible preamble, of the name of the information provider, the price, and a brief description of the product, service or information offered. The rules also require that the caller be given an opportunity to hang up, after obtaining that information, without being charged for the call. We provide for the exemption of nominally priced programs and allow bypass of the preamble for repeat callers. We also require a special warning on programs aimed at or likely to be of interest to children under the age of eighteen. The rules require the IXCs to provide the name, address and customer service telephone number of the information providers to whom they provide transmission service. The rules require the LECs to provide blocking of 900 calls for all subscribers, and free onetime blocking for 900 services for residential subscribers. We also prohibit carriers from disconnecting basic telecommunications services for failure to remit pay-per-call service charges. Finally, the rules also impose limits on automated collect calls, line seizure by autodialers, and the use of dual-tone, multifrequency tones in advertising for pay-percall programs.

VI. ORDERING CLAUSES

93. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, and 403 that Parts 64 and 68 of the Commission's Rules ARE AMENDED as set forth in Appendix B below.

94. IT IS FURTHER ORDERED that this *Report and Order* will be effective thirty (30) days after publication of a summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[141] This preemption does not apply to pay-per-call services that might be offered now or in the future in a state that are purely jurisdictionally intrastate. In addition, this preemption does not apply to locally offered pay-per-call services to which interstate access is blocked.

[142] We note that several parties have raised the issue of whether a state may block *all* 900 call from an exchange if the exchange is not capable of blocking such calls on an individual subscriber basis. *See e.g.*, Reply Comments of COAC at 6-7. We will address those concerns in a separate proceeding, because the record herein does not contain sufficient information to decide whether we must preempt such state action.

APPENDIX
LIST OF COMMENTERS

1. Abraham Publishing Group, Inc. — Abraham
2. Alabama Public Service Commission — AL PSC
3. Allied Marketing — Allied
4. American Association of Advertising Agencies — AAAA
5. Ameritech Operating Companies — Ameritech
6. American Newspaper Publishers Association — ANPA
7. American Telephone and Telegraph Company — AT&T
8. Amrigon Enterprises Incorporated — Amrigon
9. Association of Information Providers of New York — AIPNY
10. Audio Communications, Inc. — ACIA
11. Bell Atlantic Telephone Companies — Bell Atlantic
12. BellSouth Telephone Companies — BellSouth
13. Better Business Bureau of Metropolitan New York — BBBNY
14. Better Business Bureau of Tennessee and Georgia — BBBTN/GA
15. California Department of Consumer Affairs — Cal. CA
16. California Public Utilities Commission — Cal. PUC
17. Capital Cities/ABC, Inc. — CC/ABC
18. Central Telephone Company — Centel
19. Consumer Action — CA
20. Council on Audio Communications, Inc. — CAC
21. Covington, Michael — Covington
22. Direct Marketing Association — DMAJ
23. Cincinnati Bell Telephone Company — Cin. Bell
24. Herman, Christopher — Herman
25. Competitive Telecommunications Association — Comptel
26. Connecticut Attorney General — Conn. AG
27. Delaware State Legislature — Delaware
28. Fairfax County, Virginia — Fairfax
29. Federal Trade Commission — FTC
30. Representative Bart Gordon of Tennessee — 77 Rep. Gordon
31. GTE Service Corporation — AGTE
32. Hubert H. Humphrey III. Minnesota Attorney General — Attorney General Humphrey
33. Indiana Office of Utility Consumer Counselor — IUCC
34. Indiana Public Utility Regulatory Commission — IURC
35. Infoman — Infoman
36. Information Industry Association — IIA
37. Information Providers' Coalition for Defense of the First Amendment — Coalition
38. Interactive Telemedia — IT
39. International Shoppers Spree — ISS
40. Iowa Utilities Board — IA UB
41. Island Broadcasting Co. — Island
42. KAOS Communications, Inc. — KAOS
43. MCI Telecommunications Corporation — MCI
44. Maine Public Utilities Commission — ME PUC
45. Manor Inn of Bethesda — Manor
46. Massachusetts Attorney General — Mass. AG
47. Michigan Public Service Commission Staff — MPSC
48. Missouri Office of the Public Counsel — MO OPC
49. Montana Public Service Commission — MT PSC
50. Music Access, Inc. — Music
51. National Association of Attorneys General — NAAG
52. National Association of Consumer Agency Administrators — NACAA
53. National Association for Information Services — NAIS
54. National Association of Regulatory Utility Commissioners — NARUC
55. National Association of State Utility Consumer Advocates — NASUCA
56. National Consumers League — NCL
57. National Consumer's League, Report of the National Symposium on 900 Numbers — NCL Report
58. National Telecommunications and Information Administration — NTIA
59. National Telephone Cooperative Association — NTCA
60. New York City Department of Telecommunications — NYCDT
61. New York State Department of Public Service — NYSDPS
62. Nixon, Hargrave, Devans and Doyle — Nixon
63. Nycom Information Services, Inc. — Nycom
64. NYNEX — NYNEX
65. Ohio Public Utilities Commission — Ohio PUC
66. Organization for the Protection and Advancement of Small Telephone Companies — OPASTCO
67. Pacific Bell and Nevada Bell — Pac Tel
68. Pennsylvania Public Utility Commission — PA PUC
69. Promotion Marketing Association — PMA
70. Phone Programs, Inc. — PPI
71. Rochester Telephone Corporation — RTC
72. Commissioner of Social Security — Comm SS

73. Southwestern Bell Telephone Company	SW Bell
74. Talisman Communications Corp.	Talisman
75. Tel Control, Inc.	TCI
76. Teleline, Inc.	Teleline
77. Telesphere Communications, Inc.	Telesphere
78. Tennessee Attorney General	TN AG
79. Texas Public Utility Commission	TPUC
80. United States Catholic Conference	USCC
81. United States Postal Service	USPS
82. United States Telephone Association	USTA
83. United Telecommunications, Inc.	United
84. Mary Sue Terry, Attorney General for Virginia	VA AG
85. Wisconsin Public Service Commission	WI PSC

APPENDIX B

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, unless otherwise noted.

2. New sections 64.709 through 64.716 are added to read as follows:

§ 64.709 Definition of Pay-Per-Call Services.

"Pay-per-call" services are telecommunications services which permit simultaneous calling by a large number of callers to a single telephone number and for which the calling party is assessed, by virtue of completing the call, a charge that is not dependent on the existence of a presubscription relationship and for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call.

§ 64.710 Limitations on the Provision of Pay-Per-Call Services.

Common carriers may provide interstate transmission, under either contract or tariff, for pay-per-call services only under the terms and conditions required by §§ 64.711 through 64.716.

§ 64.711 Preamble.

(a) Programs must begin with a clearly understandable and audible preamble that states the cost of the call. The preamble must disclose all per call charges. If the call is billed on a usage sensitive basis, the preamble must state all rates, by minute or other unit of time, any minimum charges and the total cost for calls to that program if the duration of the program can be determined. No preamble is required for programs with a flat-rate charge of $2.00 or less.

(b) The preamble must state the name of the information provider and accurately describe the information, product or service that the caller will receive for the fee;

(c) The preamble must inform the caller that billing will commence only after a specific identified event following the disclosure message, such as a signal tone, and must provide a reasonable opportunity for the caller to disconnect before that event;

(d) The preamble associated with interstate pay-per-call offerings aimed at or likely to be of interest to children under the age of eighteen must contain a statement that the caller should hang up unless he or she has parental permission; and

(e) A caller may be provided the means to bypass the preamble on subsequent calls, provided that the caller is in sole control of that capability, except that any bypass device shall be disabled for a period of thirty days following the effective date of a price increase for the pay-per-call service. Instructions on how to bypass must either be at the end of the preamble or the end of the program.

§ 64.712 Identification of Information Providers.

The carrier providing interstate transmission for pay-per-call services shall provide to consumers upon request the name, address and customer service telephone number of any information provider to whom the carrier provides such transmission service, either directly or through another entity such as a service bureau. The carrier shall provide that information at no charge and within a reasonable time upon verbal or written request.

§ 64.713 Blocking of 900 Service.

Local exchange carriers must offer to their subscribers, where technically feasible, an option to block interstate 900 services. Blocking is to be offered at no charge on a one-time basis to all residential telephone subscribers. For blocking requests not within the one-time option and for commercial subscribers, the local exchange carrier may charge a reasonable one-time fee for each such blocking request. Requests by subscribers to remove 900 services blocking must be in writing.

§ 64.714 No Disconnection for Failure to Remit Pay-Per-Call Service Charges.

No common carrier shall disconnect, or order the disconnection of, a telephone subscriber's basic communications service as a result of that subscriber's failure to pay interstate pay-per-call service charges.

§ 64.715 Automated Collect Telephone Calls.

No common carrier shall provide transmission services for pay-per-call services originated by an information provider and charged to the consumer,

unless the called party has taken affirmative action clearly indicating that it accepts the charges for the collect pay-per-call service.

§ 64.716 Generation of Signalling Tones.

No carrier shall provide transmission services for any pay-per-call service which employs broadcast advertising which generates the audible tones necessary to complete a call to a pay-per-call service.

3. The authority citation for Part 68 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, 48 Stat., as amended, 1066, 1070, 1087, 1094, 1098, 1102, 47 U.S.C. 154, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, unless otherwise noted.

4. Section 68.318 is amended by adding subsection (c)(2) as follows:

§ 68.318(c)(2) Line Seizure by Automatic Dialing Devices.

Automatic dialing devices which deliver a recorded message to the called party must release the called party's telephone line promptly but in no event longer than current industry standards.

Before The
Federal Communications Commission
Washington, D.C. 20554

FCC 91-306
38259

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules	)	CC Docket No. 90-6
	)	
In the Matter of	)	
	)	
Amendment of the Commission's Rules for Rural Cellular Service	)	CC Docket No. 85-388
	)	
In re	)	
	)	
Cellular Applications for Unserved Areas in MSAs/NECMAs	)	

FIRST REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: September 26, 1991 Released: October 18, 1991

By the Commission:

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I. INTRODUCTION

1. The Commission sought public comment on proposed rules for the acceptance, processing and selection of applications for unserved areas 1 in the Cellular Service and other proposed rule changes dealing with existing cellular licensees. See Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, 5 FCC Rcd 1044 (1990), 55 Fed. Reg. 4882 (1990) (Notice). In this Report and Order we adopt rules for the acceptance, processing and selection of applications for unserved areas in the Cellular Service. We also modify other cellular rules, as explained below. In addition, we are denying petitions for reconsideration of two orders related to this proceeding. Numerous parties (listed in Appendix A) filed comments2 and reply comments in this proceeding. Generally the parties supported the Commission's goals and either agreed with the proposed rules or offered alternative proposals.3 We have made some modifications to the original proposals to meet the concerns of interested parties.

2. At the outset we reiterate our goals in adopting rules for the provision of service in unserved areas. The most important goal is the creation of a seamless and integrated nationwide cellular service, so that subscribers can receive high quality cellular service throughout the nation. In addition, we strive to make cellular service available to the public as expeditiously as possible. Further, we wish to ensure the integrity of our licensing process while providing the widest possible opportunity for

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1 These unserved areas are generally within the borders of MSAs, RSAs, New England County Metropolitan Areas for the New England States (NECMAs) and GMSA. Reference to MSAs or RSAs includes NECMAs and GMSAs. Unserved areas would include any area not currently covered by a Cellular Geographic Service Area (CGSA). The CGSA is the geographic area within an MSA or RSA that is served by an authorized cellular system. See Sections 22.2 and 22.903(a).

2 Comments were originally scheduled to be filed on April 2, 1990. On March 29, 1990, in response to a request from CTIA, the deadline for filing comments was extended to April 16, 1990. See Order, DA No. 90-479, (Com. Car. Bur. March 29, 1990), 55 Fed. Reg. 12390 (1990). Ex parte comments were filed by Jonathan Blake. See Blake's letter to Secretary, FCC (July 23, 1990).

3 We have analyzed all of the arguments contained in the comments before resolving this rulemaking proceeding. However, not all of the points raised in the comments are discussed in the Report and Order for reasons of brevity.

participation in the licensing process by all qualified candidates. We are adopting rules which we believe will strike a fair balance to accomplish all of these goals. Additionally, we have been convinced by the commenters that we need to study further some of our previous proposals and we are issuing a further notice of proposed rulemaking seeking comment on those matters.4

II. BACKGROUND

3. The Commission established 306 Metropolitan Statistical Areas (MSAs) and 428 Rural Service Areas (RSAs) for the purpose of licensing two cellular service carriers per market.5 Under current rules, initial licensees have a five-year fill-in period during which they may expand their systems within the markets free from the filing of competing applications.6

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4 See Amendment of Part 22 of the Rules to Provide for Filing and Processing of Applications for Unserved Areas (Further Notice of Proposed Rulemaking), Mimeo # FCC 91-311, Adopted September 30, 1991.

5 See generally, Cellular Communication Systems (Cellular Systems), 86 F.C.C. 2d 469 (1981), modified, 89 F.C.C. 2d 58 (1982), further modified, 90 F.C.C. 2d 571 (1982); appeal dismissed sub nom. United States v. FCC, No. 82-1526 (D.C. Cir. 1983); Rules for Rural Cellular Service (First Report and Order), 60 RR 2d 1029 (1986), modified, 2 FCC Rcd 733 (1987), further modified, 2 FCC Rcd 3366 (1987), 4 FCC Rcd 5272 (1988), 3 FCC Rcd 4403 (1988), and 4 FCC Rcd 4464 (1989). The wireline set-aside for Block B frequencies has been eliminated for unserved areas. Rules for Rural Cellular Service (Order on Reconsideration of Second Report and Order), 4 FCC Rcd 5377, 5380 (1989) (Order on Reconsideration).

6 Applications filed during this five-year period by licensees or permittees to serve areas within the MSA or RSA but outside the CGSA are referred to as fill-in applications. Sections 22.31(a)(1) and (f) state that fill-in applications within the MSA or RSA may be filed only by the initial licensee or permittee in each frequency block for a period of five years from the date of grant of its original construction authorization. See Order on Reconsideration, 4 FCC Rcd at 5379-80; Fifth Report and Order, 3 FCC Rcd 6401 (1988). This rule also applies to the Gulf of Mexico Service Area (GMSA). See Petroleum Communications, Inc., 3 FCC Rcd 399 (Mob. Ser. Div. 1988), recon. denied, 4 FCC Rcd 4085 (Com. Car. Bur. 1989). In the past, "fill-in applications" has been used to describe applications filed during the exclusive five-year fill-in period as well as applications filed within a market whose five-year period has expired. In this Report and Order the term "fill-in" refers exclusively to the former category and "unserved area" refers exclusively to the latter category.

In Rules for Rural Cellular Service (Second Report and Order), 2 FCC Rcd 2306, 2308-09 (1987), the Commission adopted rules to permit licensees to expand their systems for five years from the date the first construction permit was granted in a market without competing applications. The Commission also said that the process for filing applications and selecting licensees for unserved areas "will be determined at a later date". Id. at 2309. The Commission also codified its policy that cellular radio applications may be filed only on specified dates, Section 22.6(b)(3), and that it would subsequently announce when the applications for unserved areas "must be filed for each MSA." Id. 2309 n.17. Relying on this Commission decision and the fact that the Commission had not yet set dates for the filing of applications for unserved areas, the Common Carrier Bureau dismissed without prejudice applications for unserved areas within MSAs which had been filed after the five-year fill-in period had ended in certain markets because they were prematurely filed. See Cellular Applications for Unserved Areas in MSAs/NECMAs, 4 FCC Rcd 3636 (Com. Car. Bur., April 10, 1989) (April Order). On July 6, 1989, on reconsideration of the Second Report and Order, the Commission decided that the five year fill-in period would run from each license grant as opposed to the first license granted in the market. Order on Reconsideration, 4 FCC Rcd at 5379-80. The Commission also noted that applications for unserved areas filed after the expiration of the five-year period would not be accepted, pending completion of a proceeding establishing rules for the processing and selection of such applications. See id. at 5383 n. 22. The Notice in this proceeding was adopted to establish such rules.

III. RECONSIDERATION PETITIONS

4. At the outset we will resolve the pending petitions for reconsideration of the April Order and the Order on Reconsideration, both of which addressed the timing for filing unserved area applications.

A. APRIL ORDER

5. While petitions for reconsideration of the Second Report and Order were pending, which requested that the five-year fill-in period run from each license grant rather than from the initial license grant in each market, applications to serve unserved areas were filed in certain MSAs. As noted above, in the April Order, 4 FCC Rcd at 3636, the Common Carrier Bureau dismissed these applications as having been prematurely filed. The Bureau based its decision on the fact the Commission had not yet set the dates for filing applications for unserved areas after the end of the five-year fill-in period, and had yet to establish procedures for accepting, processing and selecting applications for any areas that have not been applied for at the conclusion of a particular MSA market's five-year fill-in period. The Bureau dismissed the applications without prejudice giving the applicants an opportunity to refile their applications in the future in accordance with whatever requirements and procedures the Commission ultimately adopted. Concurrently, the Bureau issued a public notice listing the initial authorization date for both wireline and nonwireline systems for all MSAs. See List of Construction Authorization Dates and Expiration of Protected

Period to Modify Cellular Geographic Service Areas in MSAs, Public Notice, Report No. CL-89-126 (Com. Car. Bur. April 10, 1989). The Bureau also stated that the order did not affect applications filed by existing licensees to modify or expand their CGSAs within the five year fill-in period. Once this period has expired, however, licensees who wanted to expand their CGSAs would not be permitted to do so until the Commission announced that applications for remaining unserved areas may be filed. Additionally, the Bureau held that the second authorized licensee could file fill-in applications up to five years from the date it received its grant of a construction authorization but said applications would not be processed until the outcome of the petition for reconsideration of the Second Report and Order was adopted.

6. A number of parties filed petitions for reconsideration of the April Order.7 Petitioners argue that Section 22.31(a)(1)(i) created a date certain for filing unserved area applications. They argue that this date certain could not be modified without complying with the notice and comment requirements of the APA. Additionally, they argue that the April Order imposed a freeze on the acceptance of applications and that this was improper because (1) it resulted from the Commission's failure to abide by its own promise to provide clear notice of certain events, i.e., a public notice announcing the initial construction permit date for the MSAs and when the five year fill-in period would expire, (2) it was imposed retroactively without notice, (3) the Bureau exceeded the scope of its delegated authority in imposing a freeze and (4) the freeze is contrary to the public interest because it delays the provision of service to the public. In addition, petitioners argue that all of the arguments raised by various parties were not considered in the April Order.8 Petitioners also argue that at a minimum, instead of dismissing the applications, the Bureau should have retained their applications on file while the Commission adopted new rules.

7. We deny the petitions for reconsideration of the April Order. Petitioners major contention is that the April Order was inconsistent with a clear existing Commission rule that permitted their applications to be filed. At the outset, we note that the rule says only that applications will not be accepted before the end of the five-year fill-in period (which at the time ran from the initial authorization in the market). It does not say applications will be acceptable after that period, however. See 47 C.F.R. Section

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7 See Appendix A.

8 Contrary to the assertions made, all issues were taken into account in rendering the April Order. Nevertheless, given that we address all material issues in this Report and Order, any failure of the Bureau in specifically addressing each separate issue raised before it is not legally significant.

22.31(a)(1)(i). Even if the rule did so provide, however, the Commission made clear at the time it was adopted that "this is not the time to establish the process for selecting applications" for unserved areas and that the Commission would "announce later" when such applications "must be filed for each MSA." Second Report and Order, 2 FCC Rcd at 2309, 2311 n. 17. Thus, petitioners were on notice that applications for unserved areas would not be acceptable until further action by the Commission. The Bureau thus simply followed pre-existing Commission policy in dismissing the applications; it did not exceed its delegated authority or itself adopt a freeze and apply it retroactively.9

8. We also note that dismissal of the applications as premature did not prejudice the applicants and was a proper exercise of the Bureau's discretion. Because the applications were dismissed without prejudice, applicants have the right to re-file their applications in accordance with the rules and procedures we adopt today. No mutually exclusive applications for areas and frequencies for which they are eligible to apply under the Order on Reconsideration and the rules adopted today have been granted, nor have the applicants been cut off from applying for any areas and frequencies for which they are eligible.10 The effect of dismissal of petitioners applications as premature is thus sharply different from the situation in Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987), where the court reversed the dismissal with prejudice of an application as being late-filed where the cut-off rule was not sufficiently clear.

9. Moreover, although the policies adopted in the Second Report and Order as implemented by the April Order do delay for a time providing service to the public in these areas, this delay is relatively insignificant.

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9 The fact that the Bureau initially (and erroneously) accepted the applications for filing does not bind either the Bureau or the Commission. See 47 C.F.R. Section 22.26(b).

10 The fact that the Bureau took a different approach with licensees' fill-in applications filed after five years from the date of grant of the first-authorized carrier but before five years from the date of grant of the second-authorized carrier is not improper. In that case, the Bureau permitted such applications to remain on file, but not to be processed, pending reconsideration of the Second Report and Order. Without such action, the second-authorized carrier would have been prejudiced by a dismissal, even one without prejudice to refiling, because the second-authorized carrier may have been unable to refile its fill-in application if the petitions for reconsideration to extend the fill-in period were granted after the second-authorized carrier's modified fill-in period had expired. In these circumstances, the difference in treatment was rational, protected parties' interests and is, therefore, affirmed.

Given that several major substantive issues (e.g., what is an unserved area) were unresolved, accepting applications at an earlier date would have created unnecessary litigation, delaying the entire process anyway. Therefore, declining to accept applications for unserved areas until procedures were established and filing dates announced reduces uncertainty and, therefore, is in the public interest.

10. We also reject Pacific Telesis' arguments that its due process rights have been violated because other "equally situated" applicants had their applications granted while Pacific Telesis' applications modifying CGSAs to include unserved areas were dismissed. Modifications of CGSAs to include unserved areas filed after a five-year fill-in period expires are treated as applications for unserved areas. The cases cited by Pacific Telesis in support of its position all involve instances where applications have been granted proposing to serve areas within a pre-existing CGSA with de minimis 39 dBu contour extensions outside the MSA filed after the five year fill-in period has expired. De minimis contour extensions outside the MSA are not considered CGSA extensions and thus are not applications for unserved areas. Section 22.903 (a). De minimis contour extensions are granted only when dictated by engineering needs to serve areas inside the MSA. See e.g., South Carolina Motornet, Inc., DA 91-168 (Mob. Ser. Div. Feb. 19, 1991). We find that the Bureau's action with regard to the dismissed applications is consistent and correct.

B. ORDER ON RECONSIDERATION OF SECOND REPORT AND ORDER

11. In the Order on Reconsideration, we modified Section 22.31 (a)(1)(i) to provide all licensees a protected fill-in period of five years which runs from the date of the initial construction authorization for each frequency block granted in an MSA.11 We found that requiring the second carrier to expand within five years from the date of the first carrier's construction permit unfairly restricts the second carrier's ability to meet changes in service needs, particularly where there was a lengthy period of time between granting the first and second authorizations.12

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11 Originally, the Commission had adopted an MSA five-year fill-in period to commence on the date the first licensee was granted a construction authorization. Second Report and Order, 2 FCC Rcd at 2307-09.

12 The RSA five-year fill-in period always commenced on the date each licensee was granted a construction authorization. See note 5, supra.

12. JAJ Cellular (JAJ) and McElroy Electronics, Corp. (McElroy)13 filed petitions for reconsideration of the Order on Reconsideration. Most of their arguments relate to the dismissal of their applications, discussed above. Since their applications were dismissed pursuant to the Second Report and Order, not the Order on Reconsideration, there is no reason to address these arguments at length again. We simply note that the Commission's change of the five-year period in the Order on Reconsideration was not retroactively applied as a basis for dismissing JAJ's and McElroy's applications. As stated in the previous Section, JAJ and McElroy filed applications before we established a date certain for the filing of unserved area applications. Furthermore, the rule change did not have retroactive effect with respect to JAJ and McElroy since to this day, and until the rules we are adopting in this rulemaking are effective, they still can not file their applications. We recognize that the change in the fill-in period for the second-authorized carrier may have decreased the geographic area which was available for an unserved area applicant and that this may affect JAJ's and McElroy's business plans. The Commission is entitled to change its eligibility criteria in rulemaking proceedings as long as we provide an adequate explanation for the change. See United States v. Storer Broadcasting, 351 U.S. 192 (1956)(Storer).14 Since these principles were adhered to in this case, the fact that the change collaterally affected petitioners' expectations does not render the change retroactive, unlawful or unreasonable.15 See Bowen v. Georgetown University Hospital, 488 U.S. 204, 216 (1988) (Scalia, J. concurring). As stated previously, the facts in Maxcell, supra at para. 13, are different from this case. Therefore, we deny the petitions for reconsideration.

IV. PROCEDURES FOR FILING AND PROCESSING APPLICATIONS FOR UNSERVED AREAS

A. APPLICATION FILING PROCEDURES

13. In the NPRM we proposed that applications for unserved areas be filed in response to perceived demand after the end of the five-year fill-in period applicable to the frequency block for which the application is made.

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13 McElroy also filed a Request for Expedited Consideration on March 5, 1991, which is now moot.

14 Indeed, even if JAJ's and McElroy's applications had remained pending, if they were inconsistent with the revised five-year rule, they could be dismissed pursuant to Storer.

15 Moreover, petitioners have not offered any support for their statements that we cannot change rules on reconsideration.

In the alternative, for those markets where five-year fill-in periods have already expired, or will expire 90 days after the effective date of the final rules adopted in this proceeding, we proposed to announce a filing window or other date certain for the filing of unserved area applications. Additionally, we proposed to maintain MSA boundaries for one year after adoption of rules for filing unserved area applications. During this one-year period all applications filed for unserved areas within the MSA on the same frequency block would be considered mutually exclusive regardless of whether or not their CGSAs actually overlap. We proposed that, thereafter, applications for unserved areas be filed under traditional cut-off procedures. Applications for the same frequency block and proposing CGSAs which overlap in such a way that grant of one would preclude the grant of one or more of the other applications irrespective of MSA or RSA boundaries would be considered mutually exclusive. We additionally proposed that an application be considered mutually exclusive and eligible for random selection with the first-filed application, if the application is received by the Commission in a condition acceptable for filing within 30 days after the date of public notice listing the first of the conflicting applications as accepted for filing (cut-off date). Whenever three or more applications are mutually exclusive we proposed that the public notice date of the first-filed application established the cut-off date, following the traditional Part 22 daisy chain rule. An application could propose service to only one CGSA which could include multiple overlapping 39 dBu contours; additional CGSAs could be applied for in separate applications. We requested comment on any other proposals that would satisfy the Commission's goals. Additionally, we sought comment on whether we should allow a licensee to propose a minor change to its system without mutually exclusive applications being filed against its proposal and requested comment on what the definition of a minor change should be for this purpose.

1. COMMENTS

14. For markets in which the fill-in period has expired or will expire during this rulemaking proceeding BellSouth recommends that the Commission establish a staggered set of filing windows, in groups of 10 or 12 markets for each window. Pactel recommends, at least initially, a system of date certain filing deadlines to control the flow of applications and to minimize the strain on Commission resources. CTIA, Telocator and several other parties believe the Commission should implement regular notice and cut-off rules for markets where the fill-in period has already expired. McCaw argues that date certain application deadlines appear to encourage speculative applications. CTIA and other parties urge the Commission to allow competing applications a minimum of 60 to 90 days for the cut-off period. On the other hand, BellSouth and McCaw agree that the 30 day cut-off period would effectively prevent the filing of speculative applications. CTIA, McCaw and BellSouth recommend that unserved area applicants serve a copy of their application on the licensed MSA or RSA as well as licensees of any adjacent MSA or RSA.

15. Many of the parties argue that the market boundaries should be retained for different periods of time, from the end of the fill-in period to

the end of the ten-year license. According to BellSouth, without these boundaries, applicants and the Commission will face tremendously complex groupings of mutually exclusive applications. Others endorse the proposed elimination of MSA and RSA boundaries because there are benefits to applicants being able to propose systems encompassing natural markets which cross RSA or MSA lines. Ameritech proposes that the Commission allow applicants to file applications for unserved areas in a state in order to encourage the development of efficient cellular systems once all the fill-in periods for the RSAs in a given state have expired. Some parties argue that the Commission should not accept unserved area applications until the the fill-in period has expired for both licensees in a market. They argue it would be premature to accept applications for unserved areas until the MSAs and RSAs are completely built out because unserved areas cannot be determined until the MSAs and RSAs are totally built. Nynex recommends extending fill-in periods to unserved areas to discourage applicants from proposing larger systems than initially necessary in order to avoid the potential for a lottery when they sought to expand their systems. Others suggest a one-year fill-in period for unserved areas.

16. PacTel and BellSouth recommend that all applications filed in a market in response to a date certain filing deadline for a given MSA or RSA be considered mutually exclusive. Pactel further suggests that after a final decision is issued, the staff should review the remaining applications to determine whether any could be granted without causing interference to the new permittee. PacTel argues that this system could continue until there are no more applications capable of being granted without causing interference to existing licensees or permittees. CTIA believes it should be acceptable for an RSA permittee or licensee to file an application for a CGSA that includes both a part of its RSA and the unserved area of an adjacent MSA. Similarly, an applicant that has made the necessary arrangements with the holder of an RSA authorization should be allowed to file for a CGSA that includes both the unserved area and the relevant portion of the RSA. Ameritech and Contel agree with the proposal to allow only one CGSA in each application which could propose multiple, overlapping 39 dBu contours to encourage efficient licensing.

17. CTIA, Telocator and other parties agree that existing MSA licensees should be allowed to make minor modifications to their systems without being subject to the filing of competing applications. The commenters suggest that the proposal will provide licensees with needed flexibility to meet demand or unexpected service needs. Parties suggest that: any change not exceeding one mile; an increase in the area served by a cell by 10% to 15% or less; an increase in the 39 dBu contour of a cell site no greater than 3 to 10 miles; any increase in a service area which results from installation of a cell enhancer, be considered minor. Blais argues that existing licensees should be permitted to make modifications to existing cellular base stations to make the coverage more efficient within 90 days of the effective date of the new rules as long as the currently authorized CGSA is not increased. McElroy argues that the proposal should not be adopted because incumbent licensees have had five years to fully expand their systems and no

justification exists even for minor adjustments after the exclusive fill-in period has run.

2. DISCUSSION

18. There is no precise way to predict the number of applications that will be filed, and the comments are divided on the question of whether large numbers of applications for unserved areas will be filed. Based on our previous experience we can reasonably predict that for MSAs whose fill-in periods have already expired the number of applications filed may be substantial particularly in view of the fact that in some of these markets applications were already prematurely filed and dismissed. These markets are the largest in the nation and are likely to attract a large number of filings.

19. In making a determination of the filing procedures to be used and how to determine mutual exclusivity, there are several conflicting goals that we desire to meet and which are identified by the commenting parties. First, we want to ensure that we do not create an artificial incentive for parties to file applications for unserved areas. Second, we want to ensure that applicants be able to propose facilities that make engineering sense, are cost-effective, and which cover geographic areas the applicant actually wants to serve. Third, we wish to process applications in as rapid a manner as possible to promote prompt service to the public.16 Fourth, we believe sincere applicants should be provided with a fair opportunity to participate in the application process.

20. The parties have made a wide variety of proposals which would meet one or more of these goals; however, none of the proposals meets all of these goals. In addition, from the comments, we are convinced that the specific proposals contained in the Notice do not adequately meet all of these goals either. Therefore, we have decided to adopt a compromise procedure for the time period during which applications may be filed and in making determinations of mutual exclusivity. We believe that this approach strikes a fair balance in meeting the above-stated, conflicting goals.

21. We are adopting an application processing scheme that has two phases for all markets in which the five-year fill-in period has expired or will expire in the future. Phase I will permit unserved area applications to be filed during a filing window. For markets in which the fill-in period

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16 We do not agree with GTE that we need to postpone the filings of unserved area applications until the MSAs and RSAs are completely built. Although such an approach may somewhat alleviate uncertainty as to what areas will actually be unserved, this benefit is clearly outweighed by the detriment to the public that would result by delaying service to the public.

has already ended and markets in which the fill-in period will end 90 days after the publication of this order in the Federal Register, the Commission will announce the time for filing applications in a public notice. For markets in which the fill-in period will end after 90 days after publication (91st day) the filing window will be on the 31st day after the end of the fill-in period. The unserved area applicant filing during Phase I, which is granted a construction permit, will be permitted to modify its application once without being subject to competing applications [see Appendix C] and must fully build out that proposal. Phase II will permit any applicant to file for an unserved area in a market already licensed during the first phase, but applications will be granted on a first come, first served basis until there are no more areas remaining unserved in that market. See Sections 22.6, 22.902. These filing procedures are more fully explained in Appendix C, which contains specific both procedural and substantive filing requirements.

22. We will not adopt a rule which permits licensees to make minor extensions to their CGSAs even after the five-year fill-in period has expired at this time, in light of our proposal to issue a Further Notice of Proposed Rulemaking concerning cellular coverage area. See Rules for Unserved Areas (Further Notice of Proposed Rulemaking), Mimeo # FCC 91-311, Adopted September 30, 1991.

B. GEOGRAPHIC AREA TO BE COVERED

1. CELLULAR GEOGRAPHIC SERVICE AREA

23. Until now, applicants for initial licenses have proposed a CGSA, which defined their expected area of operation. In addition, applicants were required to identify the 39 dBu contour or contours within the CGSA. We proposed for unserved areas that CGSAs not extend beyond the 39 dBu contours but be coterminous with the 39 dBu contours. We tentatively concluded that CGSAs which extend beyond the 39 dBu contours in unserved areas will not serve a useful purpose and should not be permitted. Additionally, we saw no reason, in the context of licensing unserved areas, to protect future expansion areas. This general rule would be subject to an exception to permit a de minimis extension into an area in which the five-year fill-in period has not expired.

24. We have been convinced by the commenters that 39 dBu contours may not be the most accurate method for predicting propagation characteristics for the cellular service. We are issuing a Further Notice of Proposed Rulemaking concurrently with this order to address this issue. However, we will proceed with the acceptance of unserved area applications because we find it is in the public interest not to further delay the acceptance of applications for clearly unserved areas. In the interim and until we adopt a new standard, applications filed for unserved areas must propose CGSAs which are 75% covered by 39 dBu contours, the existing coverage requirement for RSAs. Once a new coverage standard is adopted, applicants will be able to file applications following the new standards. All unserved area licenses

granted in the interim, will be subject to the condition that they conform the CGSA in accordance with any rules adopted pursuant to the Further Notice.

25. We also agree with Nynex that an applicant may define a CGSA to include the area covered by the 39 dBu contour of a cell site as extended by a cell enhancer or re-radiator. However, this cell enhancer must be type accepted in accordance with Part 2 of the rules. See 22.120 and 22.930. We believe this follows the conclusions reached in Liberalization of Technology and Auxiliary Service Offerings in the Cellular Radio Service (Auxiliary Cellular Order), 3 FCC Rcd 7033 (1988), recon., 5 FCC Rcd 1138 (1990). We see no reason to permit the use of non-type-accepted equipment.

2. DEFINITION OF UNSERVED AREA

26. We proposed to define unserved areas as areas of the country not covered by a CGSA or 39 dBu contour. We sought comment on whether we should establish a minimum geographical coverage requirement for unserved area applications, such as 10 square miles. Finally, we also proposed to exclude from the definition of unserved areas "dead spots" (portions in the service area where the customer cannot receive service) within a licensed cellular service area.

a. COMMENTS

27. BellSouth, Cybertel and others maintain that the Commission should extend the five-year fill-in periods for MSAs and RSAs to expire concurrently with the initial ten-year authorization of each cellular carrier. They argue this is necessary in order for carriers to expand their systems in an economically rational manner, so that virtually all areas where cellular service is viable will have service, resulting in a "seamless" nationwide service. CTIA submits that the Commission should extend the fill-in period in any MSA area that is within 5 miles of the boundary of an RSA for three years after the grant of the RSA construction permit.

28. BellSouth states that the definition of unserved area proposed in the NPRM would be an acceptable standard so long as the CGSA is not pulled back to the 39 dBu contours at the end of each fill-in period. Contel recommends that unserved areas be defined as an area that is not subject to a cellular license (on one or both of the frequency blocks) and that lies between a licensed CGSA and an MSA or RSA boundary. NewVector states that a carrier's existing CGSAs should be excluded from the definition of unserved areas. GTE recommends that "unserved area" be defined as an area where no reliable service exists, and unserved area applicants would be required to prove, through propagation studies, that an entire applied for area is not actually served.

29. CTIA and Telocator support the proposal to establish a minimum coverage requirement for new applications for unserved areas. Cellular Information, Cybertel and Rochester agree with the 10 square miles minimum proposed in the NPRM for a stand-alone operator. Cellular Information recommends a larger minimum for less densely populated areas. However,

McCaw, CTIA and BellSouth maintain that the 10 square mile minimum is probably too small, not economically viable and probably not possible to design. NewVector and Nynex recommend that the Commission adopt a 30 square miles minimum coverage area in order to ensure applications are filed for the purpose of providing service to the public and not for preventing another entity from filing. According to other parties a more rational size would be 50 square miles (3.989 mile/6.42 Km radius). Other parties suggest the use of 75 or 100 square miles. In addition, CTIA and other parties believe that this restriction should apply only to those applicants proposing stand-alone unserved area systems because there is no reason to impose a minimum coverage requirement upon existing operators or adjoining cellular system operators who wish to expand their systems. Ameritech argues that minimum coverage requirements prevent the creation of "toll booth" systems, i.e., a stand alone low-powered cell located along a major highway in the corner of an existing market who could charge inflated prices. Cellular Information recommends to avoid extremely narrow CGSAs, adoption of a requirement that unserved area CGSAs meet certain geometric constraints.

30. CTIA, Nynex and other parties agree with the Commission that "dead spots" should be excluded from the definition of unserved area. McCaw argues that making dead spots available for unserved area applicants would ensure the filing of proposals intended only to solicit a pay-off from the licensee whose system encompasses the dead spot. CTIA proposes that a dead spot be defined as any area inside the outer boundary of a CGSA that is not covered by the 39 dBu contour of at least one cell.

b. DISCUSSION

31. We have previously considered and made a decision that the fill-in period would be for 5 years from the date a construction authorization is granted. See Rules for Rural Cellular Service (Second Report and Order), 2 FCC Rcd 2306 (1987), modified, 4 FCC Rcd 5377 (1989). See also Rules for Rural Cellular Service (Fifth Report and Order), 3 FCC Rcd 6401 (1988). We stated that this period allowed existing licensees and permittees the flexibility needed to construct and expand their systems within a reasonable amount of time. The NPRM in this proceeding did not propose to revisit this issue. To the extent that commenters seek to revisit this issue it is untimely and beyond the scope of this proceeding. If existing licensees wish to further expand their CGSAs after the prescribed fill-in period, they may file unserved area applications.

32. We do agree, however, because of the delay in licensing RSA markets substantially after MSA markets, five years may have been insufficient for MSA licensees to completely cover their markets at the borders. In addition, the existence of irregular boundaries, in combination with the restrictions of the de minimis extension policy, has served to hinder the ability of existing licensees to expand their systems to the market border. Nevertheless, we do not believe that these two factors justify an extension of the fill-in period. Rather, our ruling that RSA licensees may give permission to third parties to file applications in RSA markets in which the fill-in

period has not run should provide existing licensees flexibility to build out to the borders of their markets.17 In addition, the Further Notice will explore permitting existing carriers to make minor extensions to their CGSAs, which also should improve carrier flexibility.

33. We are adopting the following definition for "unserved areas." An unserved area is an area where there is no CGSA.18 We reject GTE's proposal to define unserved areas as an area where no reliable service exists because inside 39 dBu contours there may be "dead spots" caused by propagation characteristics over irregular terrain; it would be unfeasible to allow another entity to apply for these areas to provide service inside another entity's CGSA. We also reject GTE's proposal that applicants be required to demonstrate through propagation studies that an entire area which is applied for is not actually served. Such a test would be administratively unworkable and unduly burdensome to applicants. It would also lead to uncertainty and lengthy litigation and thus would delay service to the public. Therefore, GTE's proposal would not be in the public interest.

34. In order to deter speculative applications or applications filed for the mere purpose of preventing someone else from filing or for the mere purpose of entering the lottery, rather than to provide service to the public, we have decided to establish a minimum geographical coverage requirement for applications for unserved areas. However, we have been convinced by the commenters that 10 square miles, as proposed in the Notice, is too small. We agree with Nynex and NewVector that a 50 square mile contiguous19 proposal is a more appropriate standard because we have been

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17 We note that if an extension is more than de minimis, see e.g., Portland Cellular Partnership, FCC 91-135 (April 30, 1991), in order to provide coordinated seamless coverage with a neighboring RSA, it is likely that the carrier has already been able to propose additional service near the border within the five-year fill-in period, but has simply failed to do so.

18 Type accepted and properly authorized cell enhancers are considered regular cell sites within a CGSA and will be counted towards the 75% coverage requirements. Combined adjacent CGSAs are served areas. Areas where licensees have a contract contour extension with an adjacent market licensee which have been authorized by the Commission, are also served areas. Moreover, if there has been an agreement between licensees, the extension may be counted towards the 75% coverage requirement in the market where the extension is located. See Utica Telephone, 5 FCC Rcd 2791 (Mob. Ser. Div. 1990).

19 Therefore, an applicant cannot aggregate more than one area in a market to accumulate 50 square miles. A patchwork system would also not be viable and would be separated by other licensees already in the area.

convinced that 50 square miles is generally the minimum coverage necessary to ensure a viable stand-alone system.20 In addition, this requirement will, we believe, ensure that sincere rather than speculative applications will be filed.21 Existing licensees, however, do not need to meet minimum coverage requirements if they are proposing to serve an area contiguous to an existing system. We have no reason to believe that existing licensees would file for contiguous unserved areas for the mere sake of speculation as opposed to providing service to the public. In addition, a less than 50 square mile expansion area of an existing system can be a viable proposal in the context of a larger system. Therefore, there is no good reason to preclude such filings.22 See Section 22.924.

35. We agree with BellSouth that because of our proposal to maintain CGSAs until completion of a further rulemaking we need not adopt a definition for "dead spots" inside the CGSA. In addition, we are making McCaw's proposal for more efficient handling of modification applications (making the CGSA coextensive with the MSA or RSA during the fill-in period) part of our Further Notice of Proposed Rulemaking in order to gather comments on the proposal.

3. CONTOURS

36. In the NPRM we proposed that we would not allow unserved area applicants to propose 39 dBu contours extending beyond the borders of the MSA. However, de minimis 39 dBu contour extensions could be requested if supported by a waiver request and an engineering justification.23 We proposed

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20 A 50 square mile area is roughly equivalent to a typical one cell system proposed in many RSA applications. We believe that a smaller than 50 square mile stand-alone system will be unable to survive on its own.

21 De minimis extensions do not count toward meeting the 50 square mile minimum coverage requirement but a contract extension does.

22 We do not adopt Cellular Information's proposal that unserved area CGSAs meet certain geometric constraints, to avoid extremely narrow contours, because we think it is unnecessary. We fail to see how an unserved area applicant could, consistent with proper engineering techniques, design an unusually shaped system such as it describes.

23 A de minimis 39 dBu extension is a relatively small overlap of the contour into a neighboring market which is necessary for engineering reasons to serve adequately the area within the contour located inside the market of the licensee who proposes the extension.

that applications for unserved areas would not be permitted to have even de minimis 39 dBu contours which extend into an existing licensee's CGSA for the relevant frequency block or which extend into an MSA or RSA in which the five-year fill-in period has expired. After the neighboring market's five-year fill-in period runs, any unserved area licensee whose 39 dBu contour includes de minimis coverage of the neighboring market would have interference protection in that area and the extension area would automatically become part of the unserved area licensee's CGSA.

37. We also proposed to allow an existing RSA licensee to enter into a contract which would permit an unserved area licensee to maintain a 39 dBu contour covering both an unserved area and an area in an RSA where the five-year fill-in period has not yet run. We also sought comment on an alternative proposal that would permit an RSA licensee/grantee to allow others to file inside the RSA during the five-year fill-in period. This approach would eliminate the Section 22.31(f) two-step process for transferring a portion of an RSA and fill-in rights to a third party. We would instead require the third party to obtain a signed statement from the existing RSA licensee/grantee waiving its right to object to the specific service proposal.

a. COMMENTS

38. Some commenters agree with the proposals, especially if the applicant certifies that every effort has been made from an engineering stand point to limit the de minimis extension, that the applicant has no interest in serving beyond the MSA, and that the extension is unavoidable due to irregular terrain. Additionally, NewVector states that if the applicant submits a letter from the adjacent licensee stating that there is no objection to the de minimis extension, the application should be granted. In addition, according to NewVector and Nynex it is not in the public interest to require an alternative engineering showing each time a de minimis extension is proposed. This is unduly burdensome since an applicant will be required to completely re-engineer its proposal in order to eliminate the de minimis extension. Nynex recommends that if the waiver is denied, applicants be given 30 days to submit a revised application. Others agree with the proposal to make the extension part of the CGSA following the expiration of the five-year fill-in period in the adjacent market, as the most efficient way to authorize service in the area.

39. PacTel argues that if the Commission adopts the de minimis extension proposal, it should protect existing licensees (and their customers) from harmful interference caused by these new permittees or licensees by requiring unserved area licensees to eliminate immediately any such harmful interference once they receive notice from existing licensees that such interference is being caused by the new service. This system would be largely

self-executing, and minimize work for the Commission. BellSouth and Blais oppose the proposal to permit de minimis 39 dBu contour extensions from an unserved area into an adjoining MSA or RSA where the fill-in period has not expired because there is no support in the record for the rule change. Moreover, according to BellSouth the proposed rule will result in increased administrative burdens for the Commission's staff, the waiver applicant and the incumbent licensee whose MSA or RSA will be subjected to the de minimis incursion.

40. BellSouth, Southwestern Bell and other parties support the proposal that each RSA licensee have the freedom to expedite service throughout its RSA through contractual agreement with others. CTIA and BellSouth agree with the Commission's proposed elimination of the current, two-step procedure for transferring a portion of an RSA and fill-in rights. To guarantee interference-free operations, McCaw and Telocator recommend that the Commission implement external review procedures to examine the suitability of the new RSA licensees and render them responsible, like any other licensee, for their operations.

b. DISCUSSION

41. As we proposed, while geographical boundaries are retained, during the initial licensing phase for unserved area applications, Phase I and Phase II unserved area applications will not be allowed to have 39 dBu contours extending beyond the borders of the MSA or RSA, except that a de minimis 39 dBu contour extension may be requested if supported by a waiver request and an engineering justification. Applications for unserved areas filed during Phase I or II will not be permitted to have even de minimis 39 dBu contours which extend into an existing licensee's CGSA for the relevant frequency block or which extend into an MSA or RSA in which the exclusive five-year fill-in period has expired. The engineering justification for a de minimis extension should demonstrate that the system is designed only to serve areas within the boundaries of the applicant's CGSA, and that the extension is unavoidable because of irregular terrain or an unusual MSA or RSA boundary. This decision will permit licensees to design their systems efficiently. However, we see no reason to adopt the proposal of allowing the unserved area applicant to supplement its waiver request with a letter from the MSA or RSA licensee whose five-year fill-in period has not expired stating that the licensee has no objection to the de minimis extension. We believe our current procedure is more efficient and the proposal would only create additional burdens for the applicants and the staff moreover, the MSA or RSA licensee cannot validate actions contrary to our rules.

42. We will adopt the proposal to require an alternative engineering showing without the 39 dBu contour extension. We believe this will facilitate efficient application processing in case the waiver is denied. We reject Nynex and NewVector's opposition to this proposal as inefficient and one which would delay application processing. We reiterate that failure to comply with this requirement and the requirements of Section 22.19 of the rules (which also requires an alternative showing) will cause the application to be returned as defective. Moreover, we wish to clarify that we currently

do not require a waiver request for contiguous CGSAs licensed to one carrier and operated as a unified system, if there is a contour extension into the adjacent authorized service area. When CGSAs have been combined, we deem an extension into an adjoining market a minor modification and allow it to be filed on FCC Form 489. In addition, even independent adjacent market license holders can agree to contour extensions across market boundaries in accordance with Utica Telephone, supra, 5 FCC Rcd 2791(Mob. Ser. Div. 1990), and we specifically affirm that policy herein.24

43. We believe the rules we are adopting will guarantee sufficient interference protection for existing licensees. We will not grant waiver applicants any right to interference protection against the existing MSA or RSA licensee whose five-year fill-in period has not expired. However, after the five year fill-in period runs, any unserved area licensee whose previously granted 39 dBu contour includes such de minimis coverage of the extension area will have interference protection in that area which will automatically become part of the unserved area licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the five-year fill-in period and that application is granted. Before the five-year fill-in period expires, if the frequencies chosen for a 39 dBu contour de minimis extension cause interference to an existing MSA or RSA licensee, the licensee granted the waiver would have to change frequencies or pull back its contour to eliminate the interference. We note, in response to Ameritech's comments, that 39 dBu contour de minimis extensions into another carrier's CGSA are not permitted without the consent of the other license holder and, in any event, the expansion would not automatically become part of extending licensee's CGSA absent an agreement to that effect between the parties.

44. RSA licensees/permittees may allow other applicants to file inside the RSA during the five year fill-in period.25 The applicant must enter into an agreement with the existing RSA permittee licensee permitting the applicant to file in its market.26 This procedure will promote the

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24 Thus, an independent carrier on the same frequency block may extend a 39 dBu contour into an adjacent carrier's market. The extension area is entitled to interference protection. The extension area may be counted by the market in which the extension lies toward meeting the 75% coverage requirement in that market, but may not be used by the extending licensee toward meeting its 75% coverage requirement.

25 The systems constructed by third parties will not satisfy the 18 months construction requirements for the RSA licensee.

26 The contract will govern the location of the other party's CGSA and will define whatever expansion rights the RSA permittee/licensee wishes to cede to the other party during the permittee/licensee's five-year fill-in period.

expeditious provision of service to unserved areas, especially if the incumbent RSA licensee is not interested in or capable of providing service to these areas. The third party must file a Form 401, which will be subject to the 30-day public notice period and petitions to deny. See Sections 22.902 and 22.903.

4. SERVICE CONTOURS AND CGSA MAPS

45. In the NPRM we proposed to require that every existing cellular licensee file with the Commission 180 days prior to the time the 5 year fill-in period expires an updated map on a scale of 1:250,000 of its contours and a frequency utilization chart or frequency plan. We also sought comment on filing intervals, i.e., should the maps be required every year or every two years, or should filing be required when changes are made to cell sites.

a. COMMENTS

46. Commenters offered various alternatives to the map filing requirements. For instance, some argued that updated maps showing 39 dBu contours, CGSAs and frequency utilization charts or frequency plans should be required: at least 60 days before the end of the five-year fill-in period; 180 days prior to the expiration of the fill-in period; once a year (end of January) on a staggered basis; every two years; at renewal; or at any time changes are made to the CGSA or a cell site, up until such time as there exists no unserved area on the licensee's border. For markets in which the five-year fill-in period has expired Southwestern Bell recommends the filing of updated maps within 180 days after the effective date of this rulemaking. One commenter suggested that for permissive changes maps should not be required, thus continuing present policies. On the other hand, BAMS suggests that maps and updating information should be required from any licensee that is making permissive (Form 489) changes. According to the commenters, the informational update requirements would keep the Commission constantly abreast of the status of markets while allowing potential unserved area applicants to better plan and engineer their applications for unserved areas, resulting in more rapid and efficient service.

47. Cellular Communications, and Contel do not agree and question the utility of making such filings. Cellular Communications and McCaw argue that maps submitted prior to the expiration of the five year fill-in period will mislead the Commission and prospective applicants and confuse the unserved areas application process, because the contours and CGSA are likely to increase within the 6 months prior to the expiration of the five-year fill-in period.

48. BAMS submits the maps should depict the 39 dBu contours for every authorized base station facility. PetroCom requests that the Commission

continue to allow Gulf carriers to file maps at a reduced scale, so long as maps submitted are satisfactorily legible. McCaw argues that the Commission should articulate clear standards for map work in order to aid in determining which areas remain unserved and in identifying mutual exclusivity.

b. DISCUSSION

49. We have been convinced by the comments that requiring licensees to file an updated map 180 days prior to the expiration of the fill-in period would not accomplish our objectives. However, we continue to believe that we need updated information from existing systems before we can initiate the application process for unserved areas. Therefore, for all markets whose five-year fill-in period has already expired and those whose fill-in period will expire within 90 days after the publication date of rules in this rulemaking, frequency utilization plans and frequency charts must be filed within 60 days after the publication of the rules adopted in this proceeding. These maps should include any pending proposed modifications which have been filed with the Commission. We believe this time frame is sufficient for these licensees to submit the updating information. For all other markets licensees must file maps and updating information within 60 days before the end of the five-year fill-in period. This will allow time for applicants to review the maps prior to the opening of the filing window. If during this 60-day period changes to the system are made, the licensee must file an additional map with these changes.27 We disagree with the suggestion to file maps after the five-year fill-in period ends since this would only further delay the intake of applications for unserved areas. Reduced maps showing the entire MSA or RSA also must be filed. See Sections 22.925 and 22.926.

50. We will continue our practice of allowing Gulf carriers to file reduced scale maps and not requiring maps when permissive changes are made by any carrier. Permissive changes do not alter CGSA boundaries, and, therefore, are unlikely to affect an unserved area proposal. However, any time licensees change their CGSAs they are required to file updating maps of the whole system.28 Moreover, in response to McCaw's comments we will require standardized maps using the following criteria: maps must be on a scale of 1:250,000; must include an effective date; the scale, latitude and longitude must be indicated, the maps must have a clear legend, and contours and entire CGSA must be marked and identified in the map's legend. In order

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27 If these changes affect a potential applicant's ability to file for unserved areas within the filing deadline we will consider extending the filing window. Sanctions may be imposed on licensees that do not file on time or that fail to file the required updating information.

28 This includes circumstances when CGSAs are combined and when de minimis extensions are given interference protection.

to facilitate map interpretations and standardize filings we are adopting McCaw's proposal that CGSAs and contours should be marked by the outside of the contour line, regardless of the line's width. Maps will be available for public inspection in the Mobile Services room 628 reference room. In order to make one of the maps available to the public and one available to our contract copier, licensees will be required to submit three copies of the maps and they must file the maps at the Mobile Services Division front office. We also adopt McCaw's recommendation that licensee's be required to submit maps for each market in which their CGSA extends outside the MSA or RSA, even if the extension is de minimis. Since we are grandfathering current de minimis extensions and these areas will automatically become part of the licensee's CGSA, unserved area applicants have to know where these extension areas exist. We do not believe this will be burdensome since it is unnecessary for the licensee to redraw a new map which contains the extension area. It is sufficient for the licensee to provide three additional copies of its map showing the extension area in the adjacent market. These three additional copies should be marked as being filed for the adjacent market so that it can be filed properly.

C. APPLICATION CONTENT

1. ACCEPTABILITY STANDARD

51. Generally, we proprosed that applications to provide service in unserved areas should be filed in the same form as required for RSAs29 to promote the filing of applications only by persons sincerely interested in building and operating cellular systems. Specifically, we proposed to dismiss applications which did not comply with our letter perfect standard and which did not comport with minimal standards of acceptability.30 Applicants could

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29 See Section 22.923 of the rules.

30 See Timothy Roper, 4 FCC Rcd 4070 (1989) (letter perfect standard only applies to certain pre-lottery cellular filing requirements, and the applicant must (1) certify to the completeness of its application, (2) submit an original application and paper duplicate, the cover of which has to include the applicant's name, market name, market number and frequency block for which it is applying, and (3) provide two microfiche copies of its application at the time of filing). See, e.g., Jacksonville Cellular Telephone Co., 3 FCC Rcd 5386 (1988); Pactel Mobile Access, 1 FCC Rcd 564 (1986). We will continue to dismiss applications which are unacceptable for filing pursuant to Section 22.20 of the rules, in accordance with existing Commission precedent. See, e.g., Rem Communications, 3 FCC Rcd 3705 (1988)(application dismissed because of illegible map) ; Clyde W. Pierce, 4 FCC Rcd 2378 (1989) and Douglas R. Casey, 3 FCC Rcd 7193 (1988) (application dismissed for improper signature).

apply for either frequency block, once the five-year fill-in period has expired for that block, and the applicant must specify the desired block in its application. Applicants would not be permitted to have an interest in more than one pending application covering overlapping CGSAs, whether or not the pending applications were for different frequency blocks. Generally, the commenters supported the proposal. Therefore, we are adopting these proposals. The RSA rules are the result of refinements the Commission has made to the cellular application rules over the past several years. These rules reflect our goal of ensuring that service is provided to the public in the most expeditious manner. These rules are also designed to accommodate the large number of applications the Commission has received for even the smaller RSA markets. Because we continue to be concerned about potential abuses in our application process, the rules we are adopting for unserved areas should promote the filing of applications only by persons sincerely interested in building and operating cellular systems by adhering to our strict RSA cellular processing standards. See Section 22.924.

52. We do not agree with the exhibit order proposed by Merrimack (engineering, legal, environmental and interconnection exhibits) since it seems superfluous. The one we are adopting is very similar to what has been used until now, which has proved useful to applicants and the staff who are familiar with it. To reorder the exhibits at this late date, without better reasons being given to justify a change, would only delay and add confusion to the process. Furthermore, we adopt Merrimack's proposal to eliminate the environmental exhibit as repetitive since this is already required by Form 401. We are required by statute to enforce the environmental rules, and applicants whose proposals may have a significant environmental effect under Section 1.1307 must submit an Environmental Assessment, see Section 1.1311, and Commission environmental review must be completed prior to the construction of the facilities. See Section 1.1312.

2. FILING LOCATION AND COPIES

53. We proposed that applications be filed at the Strip Commerce Center Facility in Pittsburgh, with an original and one paper copy together with three microfiche copies. We will adopt this proposal. Applications must be filed at Pittsburgh with the appropriate fee, in accordance with the procedures adopted in Establishment of a Fee Collection Program, 55 Fed. Reg. 19148 (May 8, 1990); Gen. Docket 86-285, FCC 90-163, Mimeo No. 37935 (released April 20, 1990). See Sections 0.401, 1.1101 et seq., of the rules. We agree with Contel that in Phase I, applicants need not initially file the paper original of the application. In accordance with current RSA rules, the paper original must be filed seven days after the release of the public notice announcing the applicant as the lottery winner, as is the case for RSA processing. For Phase I filings, applicants must file the original or master microfiche and one microfiche copy, and a reduced copy of the map should be

depicted in the microfiche and contained in the paper original. The microfiche must be of a signed copy of the application, be properly labeled and enclosed in a properly labeled envelope. In Phase II, applicants must file the paper original and a master microfiche and two microfiche copies. We find that two microfiche copies are sufficient for our processing efforts. Therefore we are not adopting the proposal to require three copies in order to reduce costs for applicants. See Section 22.6. In both Phase I and Phase II, the full-size map Exhibit required by Section 22.924 (b)(1) must be included with the paper original of the application. We agree with BellSouth and are requiring an unserved area applicant in both Phase I and Phase II to serve a copy of the application on each incumbent licensee whose market is affected by an unserved area application since their interests are most directly affected by unserved area proposals.31

3. TRANSMITTAL SHEET

54. We proposed that unserved area applications include a transmittal sheet as the cover sheet to the application. The transmittal sheet also contains a certification that the application is complete, accurate and complies with Commission rules. As with applications filed for RSAs, we will adopt the proposal to have a transmittal sheet filed with applications for unserved areas. The transmittal sheet, inter alia, facilitates application intake and other processing functions. The information on the transmittal sheet must match exactly the information on the jacket of the microfiche and on the cover of the application. In addition, all required items in the transmittal sheet must be completed. We are redesigning the transmittal sheet so that Form 155 and the transmittal sheet information will be together on one form. Applicants will be required to use the new transmittal sheet for their filings. Applications filed with the incorrect or previous transmittal sheet will not be accepted for filing. See Section 22.924.

55. On the transmittal sheet, applicants will list the market number or numbers and the market name or names in which the proposed unserved area is located and the frequency block because the current market numbers will still help to determine the location of a system. Correspondingly, the top of the microfiche as well as the jacket of the microfiche should also identify the applicant's name, all affected market numbers and names and the frequency block. This rule will apply to the cover of the application as well. Failure to comply with any of these requirements will cause dismissal of the application under the "letter perfect" standard.

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31 All applicants will serve copies of their unserved area applications on the licensees for the same frequency block of any systems whose CGSA, MSA or RSA boundaries are within 50 miles of the boundaries of the proposed system.

56. Each application must have the transmittal sheet referred to above as a cover sheet for the application. The copy of the transmittal sheet will constitute the cover sheet of the original paper copy and copies of the microfiche application, although the paper copy will be preceded by a stiff cover. The transmittal sheet should be immediately followed by a table of contents and then the Form 401. In the transmittal sheet, all applicants must certify, under penalty of perjury, that the application is complete in every respect and contains all the information required by FCC Form 401 and the Commission's cellular rules. The applicant must also certify that it is the real party in interest in the application and that there are no agreements or understandings, other than those specified in the application, which provide that someone other than the applicant has an indirect or direct ownership interest in the application. The applicant must also certify that it intends to construct and operate the station as proposed and that there are no agreements or understandings in existence that are inconsistent with that intent. The certification must be dated and signed in accordance with Section 1.743 of the rules. In addition, the title of the person signing the certification must be indicated. Section 22.924.

4. MAPS

57. The NPRM proposed that the map required to be filed with the original paper copy of the application as Exhibit 1 must be on a scale of 1:250,000 and must include a legend, scale, latitude and longitude. The commenters supported the proposal and suggested additional requirements for the maps. For instance, BellSouth recommended that the map depict relevant portions of the MSA or RSA boundaries. We are adopting the proposal contained in the NPRM. The full-size map must be included in the original paper copy of the application. The reduced map must be contained in the original paper copy and microfiched copies of the application. Both maps must have a legend, and clearly indicate the map's scale, latitude and longitude. The map must be clear, legible and have cell sites specifically plotted. The map must depict with clear labelling the entire CGSA, the 39 dBu contours, and the relevant portions of the RSA or MSA boundaries visible on the map. The staff must be able to plot locations and measure distances on the map. If the map does not comply with the requirements of the rules, see section 22.926, the application will be returned as defective pursuant to Section 22.20 of the rules. See Rem Communications, 3 FCC Rcd 3705 (1988). We agree with BellSouth and are requiring that the full-sized map depict the relevant portions of the RSA or MSA (usually where the 39 dBu contours are located).32 Merrimack's proposal that both Exhibits I and II be consolidated is not adopted. Each map should appear under an exhibit cover page since this does not inordinately add to the size of the application. Additionally, we will require tabs, clearly indicating exhibits (on the upper right hand corner of the first exhibit cover page) seriatim. This will not materially add to the bulk of the application.

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32 The reduced map required in Exhibit 2 must show the entire MSA or RSA.

We are also requiring that maps on the scale of 1:250,000 be filed in duplicate. For proposals which cross market market boundaries, we will require duplicate copies of the 1:250,000 scale maps to be submitted for each market. See Rules 22.925 and 22.926.

5. FINANCIAL SHOWINGS

58. We proposed to require that all applicants submit a firm financial commitment with their applications similar to Section 22.917(c) of the rules, which is applicable to RSAs. The commenters generally agreed with the proposal. Some suggested that there is no need to require a financial showing from existing licensees operating systems. Others recommended, in order to deter speculators, that each applicant be required to secure a separate firm financial commitment for each unserved area application filed. Additionally, commenters suggested that the commitment letter have an express acknowledgement by the lender of the population in the proposed service area as well as the total construction costs, and a recitation of the applicant's basic business plan to guarantee that the lender is aware of the facts and market conditions associated with the filing.

59. The firm financial commitment requirement of Section 22.917(c) of our rules will be adopted for applications for unserved areas to encourage only bona fide applicants to file applications. Therefore, all applicants will be required to demonstrate a firm financial commitment with their applications, except as noted below. Failure to comply with the firm financial commitment rule will lead to the dismissal of the application.

60. Commenters have persuaded us that we need not require a financial showing from an existing licensee if it is proposing to serve an unserved area adjacent to and integrated with its system. However, we are not persuaded that all licensee be excluded from this requirement. Adjacent system licensees will usually be incurring only marginal additional capital costs to add additional cells to an existing system. Existing cellular licensees filing for non-adjacent territory, however, would have to incur relatively more capital expense to build a stand-alone system. Therefore, we believe that these licensees should be treated consistently with other unserved area filers and must comply with the firm financial commitment rule. We are not concerned that existing adjacent licensees will speculate in filing an unserved area application and are not concerned that they will be unable to finance the operations. In addition, we have also been persuaded that applicants will be required to have a separate firm financial commitment for each unserved area application filed which is market specific. This will guarantee that the financial institution make an independent judgment on the financial viability of the proposal and thus deter speculative filings. However, we believe it is inconsistent with normal banking practices, and therefore unreasonable, for us to require an irrevocable financial commitment; therefore Ameritech's proposal in this regard is rejected. We also reject Telocator's and McCaw's proposals that the commitment letter expressly include a recitation of applicant's business plan, and express acknowledgement of the population in the proposed service area and the construction costs, respectively, as being unnecessary for a firm financial commitment. We

presume that the lender has taken these matters under advisement before committing to lend funds. The rule we are adopting follows closely the rule we have used for RSAs which has served its purpose well. Accordingly, all applicants, except existing licensees proposing to serve an unserved area adjacent to and integrated with its system, must file and demonstrate a firm financial commitment with their applications. See Section 22.917(f).

6. OWNERSHIP OF APPLICATIONS

61. In the NPRM we proposed that a party could not have an ownership interest, direct or indirect, including interests of less than one percent, in more than one mutually exclusive application. Limited cross-ownership of applications would be permitted for publicly traded corporations and passive investors. Additionally, we proposed that an entity could not have an interest in more than one pending application for an overlapping CGSA whether or not the applications requested different frequency blocks. We also proposed to exclude from the ownership limitation mutually exclusive applications filed by existing licensees or permittees who own systems which are abutting the unserved area. Thus, our proposal would allow ownership interests, direct or indirect, in more than one mutually exclusive application, if the applicants are currently authorized in systems which abut the unserved area. We also proposed to amend Section 22.13(a) of the rules to require the disclosure of all parties to a partnership agreement and their citizenship and the submission of the partnership agreement. Commenters generally supported the proposal. Ameritech recommended that the exception for abutting systems be extended to the constituent owners of abutting licensees to encourage the development of regional systems and speed service to the public. It recommends that each entity owning 5% or more of a cellular license in a market abutting an unserved area be authorized to file an application for the unserved area. If one of the entities is chosen to serve the abutting unserved area, that applicant should be authorized to transfer its application to the joint venture. Merrimack agrees with the proposal to require disclosure of all parties to a partnership agreement but recommends this be limited to initial cellular filings.

62. We find it is in the public interest to prohibit applicants filing Phase I applications for unserved areas to have any interest in more than one application in a particular market whether or not the proposals are on different frequency blocks.33 However, we will continue the exception

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33 The rule we are adopting refers to any interests and is not limited to ownership interests. See Cellular Lottery Order supra, 98 FCC 2d at 175. See also 47 C.F.R. Section 73.3521. During Phase II, where lotteries will not be held, this ownership limitation is unnecessary except in cases of applications filed on the same day which will require lotteries. In these cases the ownership limitation would apply and the applications would be dismissed for violation of this rule.

contained in Section 22.921 of the rules for publicly traded corporations, where interests of 5% or less are not considered, and passive investors, where interests of 10% or less are not considered. In other words, we will continue to prohibit an applicant from having an interest in more than one mutually exclusive application so that a party may not artificially improve its odds in the lottery by filing multiple applications. In addition, we will continue to require that individual applicants holding less than 5% interest in a publicly held company must disclose the fact that the corporation and the applicant both have filed applications in the same unserved area, and disclose the percentage interest held in the company. See Section 22.924(b)(5). See, e.g., Section 22.923(a)(9). Failure to comply with Section 22.921 and the disclosure requirements listed above, will cause dismissal of the applications.

63. We are cognizant of the fact that application preparers are selling applications for unserved areas even before we adopt rules. One company in particular is stating that companies with more than 50 shareholders will be treated by the Commission as publicly traded corporations, thus, will comply with the Section 22.921 exception. We clarify that a publicly traded and publicly held corporation means a corporation whose shares (stock or securities) are (1) owned or available to the general public, (2) are registered with the Securities and Exchange Commission (SEC), (3) are listed, or admitted to unlisted trading privileges, on a national securities exchange, or quoted in an automated interdealer quotation system and (4) the corporation has filed SEC Form 10-Q during at least two of the four quarters preceding the filing date of the application. See, e.g., 15 U.S.C. Sections 78m(h)(8), 77b. See also Corporate Practice Deskbook, Fletcher Cyclopedia, Corporations, Rev. Permanent ed., Glossary pg. 20. See generally Cellular Lottery Order, 98 FCC 2d 175 (1984), modified, 101 FCC 2d 577 (1985), further modified, 59 RR 2d 407 (1985), aff'd in part and rev'd in part, Maxcell Telecom Plus v. FCC, 815 F.2d 1551 (D.C. Cir. 1987); Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Multiple Ownership), 97 FCC 2d 997 (1984), partial recon., 58 RR 2d 604 (1985), further recon., 1 FCC Rcd 802 (1986).

64. Mutually exclusive applications filed by existing licensees or permittees who own systems which abut the unserved area will be excluded from this ownership limitation. This will permit abutting licensees/permittees to file one application each, even though the applicants may have a common owner.[34] We believe that this exemption is consistent with our interest in

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34 As an example, company A owns a percentage participation in both B and C in which B and C are the licensees/permittees of abutting systems. B files for an unserved area which abuts B's system and C files an application for an unserved area which abuts C's system and the applications are mutually exclusive. Under our proposal, both B's and C's applications would be accepted for filing even though the applications are mutually exclusive and have common ownership interests. A could not also file its own application in this market. Additionally, A, B or C could not have an interest in pending applications for both

promoting fairness in the cellular lottery process. Our experience demonstrates, and we have no evidence to indicate otherwise, that existing licensees would not try to skew the lottery process in connection with abutting areas. However, we reject Ameritech's proposal since it would promote the filing of multiple applications and unfairly skew the lottery in favor of these partial owners of abutting systems.

65. Section 22.13(a) is amended to require the disclosure of all parties to a partnership agreement.35 The rule requires applicants to disclose the name of each partner (including partners with a less than 1% interest in the applicant) and to submit a signed and dated copy of the partnership agreement with the microfiche and original of the application. The partnership information must include each partner's citizenship. This information is needed in order to make our public interest determinations on the qualifications of an applicant and to enforce Section 310 (b) of the Communications Act. We agree with Merrimack, and we will limit this rule to initial cellular filings in both Phase I and Phase II. It would be repetitious to require this information with modification applications if the information has been previously provided, and it has not changed. Modification applicants can reference this information contained in earlier filings. However, if the information has changed a modification applicant must provide the information. Applicants are reminded that Commission rules, see Section 1.65, require applicants maintain updated information before the Commission.

7. FAA NOTIFICATION

66. We proposed to require applicants for unserved areas to notify the FAA of their proposed construction, if necessary, at the time they are announced by public notice as lottery winners. Additionally, we proposed in the event an applicant does not have mutually exclusive applications filed against its application, FAA notification should be filed 45 days after the application has appeared on public notice as acceptable for filing. BellSouth supports these proposals. On the other hand, Ameritech opposes the proposal stating instead that FAA notification should be required once an applicant is

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frequency blocks A & B in the same geographic area at the same time.

35 See Common Carrier Bureau Issues Declaratory Ruling Concerning Disclosure of Partnership Interests By Cellular RSA Applicants, Public Notice No. 366 (released November 3, 1988). In this ruling the Bureau stated that the clear intent of Section 22.13 (a)(1) of the rules, read in conjunction with the cellular ownership rules, was to require the identification of all partners to a partnership agreement. With the amendment to Section 22.13(a) this policy is explicitly stated in the rules.

announced as the tentative selectee, rather than when it is announced as the lottery winner.

67. Recognizing that we are adopting a different licensing scheme than the one proposed, we will require Phase I applicants to file with the FAA at the time they are announced by public notice as the lottery winner. For Phase II, applicants will notify the FAA at the time they file their applications. This will expedite the FAA notification procedures, while at the same time placing applicants in a position to engage in preconstruction prior to grant in accordance with Section 22.43(d) of the rules. See Section 22.924. We disagree with Ameritech's proposal because it will delay processing of applications. Since most lottery winners are named tentative selectees, the adopted procedures will not be burdensome on applicants.

8. COORDINATIION

68. We proposed to add to our rules a new Section 22.903(f)(1)(i) with requirements for frequency coordination in cases of 39 dBu contour de minimis extensions from unserved area systems into MSAs or RSAs in which the five-year fill-in period has not yet expired. In accordance with current policies, we proposed to follow existing coordination procedures with Mexico and Canada for unserved area systems. Systems close to either of these two borders have to coordinate with systems in the two countries in accordance with established procedure and treaties. Blais recommends further strengthening the rule by requiring that coordination be initiated after a construction permit is granted but no later than 60 days prior to the scheduled effective date of any changes to the existing frequency plan on file. BellSouth agrees with the proposal to apply current procedures for coordination with Mexico and Canada to unserved area systems.

69. A new rule will be added with requirements for frequency coordination in cases of 39 dBu contour extensions from unserved area systems into MSAs or RSAs in which the five-year fill-in period has not expired. Systems close to either Mexico and Canada will have to coordinate with systems in the two countries in accordance with established procedures or treaties. See Section 22.903.

70. We agree with Blais that the proposed rule can be strengthened and are incorporating its proposal into the rule we are adopting. Therefore, licensees constructing systems must initiate coordination no later than 60 days prior to the scheduled effective date of any changes to the frequency plan on file with the Commission. See Section 22.902(d)(5).

D. LOTTERY PROCEDURES

71. In the NPRM we proposed that after the five-year fill-in period expired in either an MSA or RSA, applications for remaining unserved areas should be treated as applications for an initial license. Under this approach, existing licensees would not be provided any preference over new applicants. Additionally, we proposed to select applications for unserved areas by the use of lotteries and that the Commission review only the qualifications of each lottery winner.

1. COMMENTS

72. Southwestern Bell agrees with the proposal to use lotteries to select among competing applicants. However, according to CTIA, use of lotteries in this instance is unlikely to accelerate service to the public to a significant degree. CTIA, Telocator and McCaw argue that lotteries for unserved areas would be prone to abuse because of the higher probability that applications would be filed for the mere sake of speculation or delaying the expansion of an already authorized system. McCaw believes applicants' proposals in unserved areas will be ill-suited for lotteries because of the nature of unserved areas, their small size and uncertain economic value. Cellular Communications submits that the Commission should not employ the lottery process but should automatically award an authorization to the adjacent operator, and, if not, it should hold comparative hearings. The vast majority of the parties, all of them existing cellular carriers, argue that paper hearings, rather than lotteries, be used to select among competing applicants. Several parties suggest comparative criteria to be used in the hearings. PacTel states that a lottery cannot effectively assure that the selected permittee both can and will build and operate in a timely fashion.

73. PacTel and Vanguard suggest that the Commission assign substantial preferences to those who plan to operate their proposed cellular systems in an integrated fashion with their cellular operations in adjoining areas and to those who seek to serve the largest areas. These applicants offer the public the potential for lower rates because of the economies of scale (including lower equipment, marketing, personnel, and other costs) and they offer the public the substantial service advantages of large, fully integrated systems. The commenters also maintain this would deter speculators and encourage the rapid provision of service to the public and continued development of efficient regional cellular systems. Pactel suggests that secondary preferences be given to those who plan joint technical, marketing and other operations between their proposed cellular facilities and other nearby cellular operations. The advantages offered by these applicants appear to be less certain and substantial than those of applicants that own adjacent cellular facilities.

74. PMN proposes that local exchange telephone companies whose local exchange area is not being served by a cellular system should have an exclusive opportunity to file unserved area applications for such area, on Block B frequencies, for 6 months after expiration of the five-year fill-in period. This is necessary, PMN maintains, to guarantee an opportunity to local exchange carriers to provide auxiliary services without competing with others for the area.

2. DISCUSSION

75. It appears for now, that lotteries are the only realistic procedure available for selecting applications for unserved areas. Lotteries are in the public interest because they accomplish our goal of expediting service to the public. Section 309 (i) of the Act provides the Commission with discretionary authority to grant licenses or permits through the use of

lotteries when there is more than one application filed for an initial license. It is clear from the legislative history that Congress intended the Commission to have the power to institute lottery proceedings in order to prevent excessive delays and costs in the licensing process. Absent the use of lotteries for the selection of unserved area applications we believe that excessive delays will result. Considering the factors enumerated by Congress for deciding whether lotteries are appropriate we find that there are potentially a large number of licenses available and there may be a large number of applications that will be filed based on our previous experience licensing MSAs and RSAs. Finally, the last criterion listed by Congress, improvement of the level of diversity of information available in the community, does not apply to this service. See H. R. Rep. No. 97-765, 97th Cong., 2d Sess (1982), P.L. 97-259, 96 Stat 1087, 1094-95 (Sept. 13, 1982).36 Furthermore, most applicants' proposals are similar with respect to areas and population to be served. Their differences, if any, are of degree and not kind, and the comparative hearing process is ill suited for comparing substantially similar cellular system designs. See Cellular Lottery Order, 98 FCC 2d 175,186 (1984), modified, 101 FCC 2d 577 (1985), further modified, 59 RR 2d 407 (1985), aff'd in part and rev'd in part, Maxcell Telecom Plus v. FCC, 815 F.2d 1551 (D.C. Cir. 1987). We will revisit our decision to use lotteries for unserved area applications if we receive Congressional authority to conduct auctions.

76. We disagree with the commenters who suggest we should employ comparative hearings because we find that even paper hearings, as opposed to full trial-type hearings, will significantly delay the application process and consequently delay service to the public. In addition, proposals will be quite similar in terms of coverage, particularly because there are so few areas remaining to be served. Moreover, we find that paper hearings are burdensome for applicants and the staff without any compelling public interest benefits. In addition, lotteries will not materially increase speculation since we are adopting rules designed to deter speculation.

77. We do not adopt the commenters' suggestions to institute preferences for adjacent licensees in the lottery process. These licensees have had five years to provide such service without competing applications.

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36 In determining whether a lottery would serve the public interest, Congress expressed its view that the Commission should look at the following factors: whether there is a large number of licenses available in the particular service; whether there is a large number of mutually exclusive applications for each license, for example whether there is a significant backlog of applications; whether employing a lottery would significantly speed up the process of getting service to the public; and whether selection of the licensee will significantly improve the level of diversity of information available in the community versus the use of the traditional comparative hearing process. Id.

We believe this has been ample time for establishing systems and that, therefore, no preference system is warranted. In addition, although adjacent licensees may achieve economies of scale, third parties can be expected for business reasons to integrate their systems with neighboring licensee's systems to achieve efficient hand-off. Given the availability of modern hand-off techniques between dissimilar infrastructure equipment, the potential inefficiencies produced by two independent licensees are substantially reduced. Switch sharing and facilities sharing by independent adjacent licensees can also produce economies. We find that any benefits to be derived from a system of preferences in the lottery are outweighed by the costs of implementation and administration, without any overriding public interest benefits.

78. We decline to adopt PMN's proposal that local exchange telephone companies whose local exchange area is not being served by a cellular system should have an exclusive opportunity to file unserved area applications for such area, on Block B frequencies. Local exchange telephone companies had the opportunity to apply for a cellular license in the initial licensing phase when the wireline set-aside was still in place. In addition, even if a local exchange telephone company failed to receive an authorization because, e.g., it lost the lottery, it has other options available to it. If the area of a local exchange telephone company is not being served by a cellular system, the local exchange telephone company can always attempt to reach agreement with the cellular licensee to provide cellular service in that area. In RSAs this could include buying fill-in rights or contracting with the RSA licensee/permittee for the local exchange company to provide cellular service in this portion of the RSA. Additionally, if the area not being served falls within the definition of an unserved area, the local exchange telephone company could file an application to provide cellular service in this area after the five-year fill-in period expires. We see no compelling reason to give local exchange telephone companies another preferred opportunity even for a limited time to file for unserved areas. As we have previously stated, the set aside no longer applies in the unserved area licensing phase. The record in this proceeding does not support a different conclusion.

79. No comments were filed concerning our proposal that the Commission review only the qualifications of each lottery winner, and the proposal is adopted. We are requiring each applicant to certify that its application meets all applicable Commission rules; applications that are deemed acceptable for filing by the Commission will be included in the lottery. An application containing this certification will be initially accepted for filing without further review and included in the lottery. In addition, the tentative selectee's application will be carefully reviewed to ensure that it complies with the cellular application standards and will be dismissed for failure to do so. Cellular Lottery Order, 98 FCC 2d 175 (1984), modified, 101 FCC 2d 577 (1985), further modified, 59 RR 2d 407 (1985), aff'd in part and rev'd in part, Maxcell Telecom Plus v. FCC, 815 F. 2d 1551 (D.C. Cir. 1987). If the lottery winner is qualified, the Commission will grant

its application and the losing applications will be dismissed.37 In the event that the selected application cannot be granted, it will be dismissed, or designated for hearing pursuant to the provisions of Section 1.822 of the rules. There will be no ranking of applications in the lottery. Therefore, if the selectee's application is dismissed, another lottery will be held to select an application from the remaining pending applications. See Rule 1.823(b)(3). See also Rules 22.916 (c) and 22.33 (a).

E. PROCESSING OF APPLICATIONS

1. PUBLIC NOTICE PERIOD

80. We proposed that applications which are acceptable for filing will be placed on public notice in accordance with Section 309(b) of the Communications Act. 47 U.S.C. Section 309(b). See also Section 22.27(b)(1), 47 C.F.R. Section 22.27(b)(1). BellSouth recommends that the public notice listing applications as acceptable for filing include the longitude and latitude of each proposed cell sites in addition to the market name(s) and numbers(s) for which the application was filed. We are adopting the proposal in the Notice. The public notice will list the market name, number and frequency block of the proposal and we believe this will constitute sufficient notice. Listing the latitude and longitude of a proposal is not necessary during Phase I since all applications within a market will be treated as mutually exclusive. During Phase II, however, we will list the location of the proposal, e.g., street address, city and town, similar to our public notices for noncellular applications, to apprise interested parties of the location of the proposals.

2. AMENDMENTS

81. For unserved areas we proposed that applicants may not file amendments prior to the lottery, except for minor amendments related to contour reduction and amendments under section 22.23(g)(2), which resolve frequency conflicts but do not create new ones. The proposals are supported by BellSouth, McCaw and Ameritech. Concerning the proposal to make available the Section 22.23(g)(2) exemption to cellular applicants, BellSouth recommends a change to proposed section 22.918(c) to make clear that an amendment may not increase the 39 dBu contours proposed in the original application where the applicant is involved in the resolution of a frequency conflict. McCaw

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37 Applicants whose applications are dismissed by the Commission or voluntarily by the applicant may file a new application for the other frequency block or during Phase II of the unserved area licensing process.

suggests that the following changes be considered minor amendments: reducing a proposed CGSA where it will eliminate interference either with an existing system or with a competing applicant; certain frequency changes (use of specific signalling or voice channels) which would address potential interference concerns; and minor site and antenna modifications designed specifically to enable compliance with relevant FAA standards. Ameritech recommends that if an applicant amends an application to change frequency blocks, the application should be treated as newly filed so that service not be delayed. McCaw argues that allowing applicants to retain their original filing date when switching frequency blocks may unfairly preclude other applicants from filing for that block.

82. In order to accelerate application processing and avoid continuous changes to applications in Phase I, applicants in this phase may not file any amendments prior to the lottery. After we announce the tentative selectee, the selectee may file minor amendments, but no major amendments except for those listed in section 22.23(g), excluding 22.23(g)(2). Thus, for this licensing phase, we will follow the procedures used for MSA and RSA applications. Information required by Section 1.65 must be filed within 30 days of the public notice announcing the lottery results. See Section 22.918.

83. However, in Phase II we will allow minor amendments and major amendments under section 22.23(g)(2) to resolve frequency conflicts which will not cause additional frequency conflicts. We agree with BellSouth that an amendment which resolves a frequency conflict cannot increase the 39 dBu contours proposed in the application. Otherwise the applicant would be setting forth a new proposal and increasing coverage area by filing an amendment to eliminate a frequency conflict. We agree with McCaw and we will permit amendments proposing contour reductions to eliminate a frequency conflict.38 In addition, we adopt McCaw's proposal to allow frequency changes within the frequency block originally filed for (use of specific signalling or voice channels) to resolve potential interference conflicts between systems. Site and antenna modifications which do not increase the CGSA are considered minor changes. See Section 22.23(c)(3). Applications filed during either Phase I or II proposing to change frequency blocks will be considered newly filed. We agree with Ameritech and McCaw that allowing applicants to switch frequency blocks without treating the application as newly filed would delay service to the public. Allowing an applicant to retain its filing date would undermine the public interest as well as basic fairness considerations since

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38 However, applicants should keep in mind that we have a minimum coverage requirement for unserved area applications. See Section 22.924. Modifications which reduce the CGSA below minimum coverage requirement will lead to the dismissal of the modification application and the original proposal will be processed.

this may unfairly preclude other applicants from filing for the block to which the applicant attempts to switch.

3. SETTLEMENTS

84. In accordance with our policy of encouraging settlements, we tentatively concluded in the NPRM that it would be in the public interest to allow full settlement agreements between mutually exclusive applicants. However, we also tentatively concluded it would not be in the public interest to allow partial settlements among mutually exclusive applicants for unserved areas, regardless of the frequency block applied for. Therefore, no cumulative chances would be awarded in the lottery. BellSouth and Ameritech concur that full settlements should be encouraged, and that no partial settlements among applicants for unserved areas should be permitted. According to BellSouth, partial settlements have only encouraged filings by speculators and allow applicants to "stack" the lottery or increase the cost of abbreviated hearings. Ameritech recommends that partial settlements and cumulative chances be allowed between co-owners of licensees abutting unserved areas. McCaw, Nynex and Telocator believe that authorizing full market settlements would foster speculation and pay-off attempts. JAJ recommends that partial settlements be allowed because partial settlements simplify the issues raised in petitions to deny and conserve scarce Commission resources, additionally they could be the prelude to full market settlements which enable the prompt establishment of service without the need for lotteries or litigation. GTE recommends that partial settlements be permitted because a great number of applications will be filed which will make it impossible to reach full market settlements among all interested applicants.

85. Following our current policies for RSAs we will allow full market settlements but no partial settlements. Partial settlements have slowed the processing of applications and delayed the initiation of service to the public. We also conclude that following this policy will deter speculative filings. See Rules for Rural Cellular Service (Third Report and Order), 4 FCC Rcd 2440 (1988). Settlement agreements involving all mutually exclusive applications may be filed no later than two business days prior to the lottery date.

4. OPPOSITION TO APPLICATIONS

86. In order to expedite application processing for unserved areas we proposed to require that petitions to deny be filed within 30 days after the date of public notice announcing the acceptance for filing of applications for unserved areas. Petitions to deny filed against the lottery winner would be reviewed after the winner is announced. CTIA argued that this proposal is not in the public interest because parties would be invited to prepare protests that will never be reviewed in effect precluding the benefits of independent review and scrutiny of the winning application. BellSouth recommends that petitions to deny should be filed only with respect to the tentative selectee in order to guarantee rigorous analysis of the winning applications. Pactel argues that the current 45-day filing period should be retained.

87. We are convinced that, during Phase I, petitions to deny should be filed only against the tentative selectee. We agree with the comments that having petitions filed against all applications would not be in the public interest because inter alia, it would prevent a thorough analysis of the applications by the petitioning parties. We will therefore permit the filing of petitions to deny only against the tentative selectee within 30 days of public notice announcing the tentative selectee. This will provide sufficient time for parties in interest to file petitions to deny while, at the same time expediting the processing of applications over the current 45-day time frame. During Phase II, however, petitions to deny are due 30 days from the date an application is placed on public notice as accepted for filing since applications will be processed on a first come, first served basis.

F. POST - GRANT RULES

1. CONSIDERATIONS INVOLVING TRANSFER OR ASSIGNMENT APPLICATIONS

88. We tentatively concluded that it would not be in the public interest to allow a licensee to sell an authorization for an unserved area by transfer, assignment or any other form of alienation, when the facilities have not been constructed.

a. COMMENTS

89. McCaw and Telocator support the Commission's proposal to prohibit the transfer of unbuilt facilities. To additionally deter speculators and uneconomical stand-alone systems, BellSouth, Nynex and Ameritech recommend that the Commission inform all applicants it will not approve the transfer or assignment of a license in a case in which the licensee of an unserved area cellular system has entered into an agreement, express or implied, to sell or dispose of the license for such system prior to the system having been operated by the licensee for a period of one year. BellSouth argues that any applicant that builds a system in an unserved area and operates it for a year, prior to agreeing to sell or dispose of it (assuming no undisclosed financial arrangement with a prospective purchaser), should be given the presumption that its application was bona fide. Century and Metro Mobile recommend that the for profit sale of unserved area authorizations be prohibited for 3 years from the grant of the construction permit. Moreover, BellSouth and PMN recommend that in any sale or transfer the unserved area applicant should only be allowed to recover the costs it incurred in the application/hearing process.

90. Cellular Communications opposes the Commission's proposal, and recommends that the Commission allow the sale, barter, transfer or assignment or other alienation of any interest in an unserved area authorization prior to the time that the facility is placed into operation. According to this commenter, the same public interest reasons which prompted the Commission to adopt its policy permitting such transfers in the past continues to apply for unserved areas, especially since unserved area

licensees will have even less demand with which to support stand-alone systems than smaller MSA and RSA operators.

b. DISCUSSION

91. In order to ensure that our processes are not abused, we believe it is necessary to prohibit the transfer of unbuilt facilities. The record of cellular licensing so far has proved that a large number of nonwireline applications have been filed, and numerous applicants have sold their authorizations without building the facilities. For unserved areas, the smallest and most economically questionable areas left in the country, the probability of applications being filed for the mere sake of speculation has substantially increased. Therefore, we conclude that the benefits to the public of preventing the free transferability of unbuilt facilities for unserved areas outweigh the benefits of allowing the free transfer of facilities for unserved areas. We also conclude that our previous rationale for permitting the sale of authorizations for unbuilt facilities is not applicable to unserved areas. In Bill Welch, 3 FCC Rcd 6502 (1988), the Commission permitted such sales in order to provide flexibility to licensees to transfer their authorizations when it is not economical to build the system as originally proposed in order to ensure that viable systems would be built. However, the economic viability of unserved areas is speculative from the outset and, therefore, there will be no "changed circumstances" between filing and building, as existed in the MSA and RSA filing rounds.

92. In addition, we have been persuaded by the commenters that in order to ensure that applicants want to provide service to the public instead of merely speculate, we should establish a time frame during which licensees may not transfer their authorizations. We will adopt BellSouth's recommendation because we find it promotes this goal. Therefore, licensees may not transfer unserved area authorizations until after the facilities have been providing service to the public for one year.39 We reject the proposals to make this time frame longer (2 or 3 years), because we believe one year is a sufficient time to accomplish our objective. Additionally, we are adopting BellSouth's proposal prohibiting licensees from entering into an agreement to sell the system before or during its one year operational period.40 Because we are adopting an absolute bar to the transferability of an authorization prior to one year of operation, we need not adopt the

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39 Pro forma assignments of authorizations or pro forma transfers of control will be allowed.

40 This means licensees may not enter into option agreements or management contracts or any other agreement whereby the licensee agrees to transfer any portion of the system before the one year of operations even if the actual transfer will take place after the one year of operations.

proposal that the seller only recover costs it incurred in the application or hearing process.41 Applications for transfer of control filed during the first year of operations will be dismissed.42 See Section 22.920.

2. CONSTRUCTION PERIOD

93. In the interest of promoting service to the public in the most expeditious manner possible and in order to deter speculative applications, we proposed to require that licensees for unserved areas complete construction and provide service to the public within one year from the authorization grant.

a. COMMENTS

94. McCaw and other parties agree that the construction deadline should be one year and that there may be some value in requiring permittees to order equipment and initiate state certification proceedings within three months from the date of the authorization. Commenters also argue that the Commission should make it clear that extensions of time to construct cellular systems for unserved areas will not be granted unless the delay is caused solely by third parties, such as local governmental entities failing to give zoning approval or completing environmental reviews for the construction of the new facilities. PacTel recommends that to obtain an extension of time, permittees be required to show that they filed for all necessary local and state permits within three months of the grant of the authorization.

95. Several parties recommend extending the construction period to 18 months; SNET recommends two years. GTE submits that three months for ordering equipment and initiating state certification proceedings is too short and recommends six months instead. Additionally, Ameritech maintains that of significant concern to the Bell Operating Companies (BOCs) is the requirement that the court that administers the Modification of Final Judgement (divesting AT&T of the BOCs) (MFJ) waive the inter-LATA communications restrictions in Section II(D) of the divestiture decree in order for a BOC to provide service in many markets.43 Ameritech proposes that

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41 If during the one year of operations an involuntary transfer of control takes place, the licensee will forfeit the authorization.

42 Applicants for transfer of control could file a waiver request if the transfer of the unbuilt facilities is merely a part of a major transaction involving the sale of an on-going business to which the unserved area license is merely an adjunt or is incidental. Cf. Section 22.23(g)(3) of the Rules; Metromedia Company, 1 FCC Rcd 1227 (1986) aff'd 3 FCC Rcd 595 (1988).

43 Pursuant to the decision in United States v. Western Electric, 552 F.

an exception should be made for BOCs awaiting consideration of an inter-LATA waiver request, the BOC should be permitted to file the waiver request either before or during the construction period.

b. DISCUSSION

96. In order to expedite service to the public we will require that all facilities proposed in the application be constructed and service to the public be initiated within one year from the authorization grant. With new construction techniques and smaller systems, a year appears to be sufficient time. Commenters have not persuaded us to the contrary. We will also adopt the proposal that licensees must order equipment and initiate state certification proceedings or other required proceedings (environmental, BOC Modified Final Judgment waiver proceedings) within three months from the date of authorization. This creates a presumption of due diligence. We believe this period of time is sufficient for licensees to initiate these proceedings. Extensions of time to complete construction will be granted only if the licensee shows that the failure to complete construction is due to causes beyond its control and it has initiated state or court approval proceedings within three months of the grant of the authorization. Accord Section 22.43(b)(1).

V. RULES APPLICABLE TO ALL CELLULAR LICENSEES

A. PETITIONS TO DEFER

97. We tentatively concluded that the "headstart" policy, which allowed nonwireline competitors to file petitions to defer the initiation of wireline cellular service because of their "headstart" or early entry into the market, should be eliminated. Therefore, we proposed not to allow the filing of petitions to defer in MSAs, RSAs or unserved areas. Wireline carriers support the proposal, arguing that during construction of its system, the second licensee in a market may build market share by placing its customers on the first system operating in the market. Nynex concludes that the headstart policy is anticompetitive because it penalizes the more efficient permittee by denying it the benefits that it would otherwise realize from its superior business abilities. McCaw, on the other hand, states that petitions to defer should be retained where the wireline set aside remains in place, because the headstart policy continues to serve valuable public interest goals, such as, enabling nonwireline carriers to place pressure on recalcitrant wirelines to achieve handoff and roaming agreements that are consistent with the Commission's cellular policies.

Supp. 131, 188-89 (D.D.C. 1982), a BOC must petition the District Court for a waiver in order to provide inter-LATA communications.

98. We believe that it is in the public interest to eliminate the petition to defer procedure for MSAs, RSAs and unserved areas. This policy was adopted when the Commission established the wireline frequency set aside because there was a possibility that wireline carriers would have an unfair headstart over nonwireline carriers in the introduction of service to the public. We adopted a policy which permitted a nonwireline to file a petition to defer initiation of service by the wireline carrier for a brief period of time not to exceed 6 months. This policy was adopted to ameliorate any possible anticompetitive effects that could result from early wireline entry. See Cellular Systems, 89 F.C.C. 2d 74-75 & n. 32. See also Rules for Rural Cellular Service (Third Report and Order), 4 FCC Rcd 2440 (1988).

99. The Commission has stated that a nonwireline selectee bears a heavy burden of showing that early entry by the wireline would not be in the public interest. Cellular Systems, 89 F.C.C. 2d at 74-75. We emphasized that we would impose a brief moratorium on service by the wireline only where it could be demonstrated in particular factual circumstances that harm to the public would result from allowing the wireline carrier an early entry into the market involved. Id. To date, no nonwireline applicant has been able to demonstrate that it was in the public interest to grant a moratorium on the provision of service by the wireline carrier. See, e.g., New York SMSA Limited Partnership, 58 RR 2d 525 (1985); Chicago SMSA Limited Partnership, 95 FCC 2d 538 (1983); Miami CGSA, Inc., Mimeo No. 4507 (Com. Car. Bur. May 31, 1984); Century Cellunet, DA 89-368 (Mob. Ser. Div. April 11, 1989).

100. Given our experience to date, it is not at all clear that early entry into a cellular market provides a wireline carrier with an anticompetitive advantage over a nonwireline carrier. We have not received any concrete evidence that late entry by a nonwireline carrier has hampered its ability to compete. Any headstart advantage has been eliminated by the ability of the nonwireline carrier to resell the wireline carrier's services until the nonwireline's system can be constructed. In addition, the mere filing of a petition to defer delays the provision of service to the public, which is an undesirable result. Therefore, we will eliminate the headstart policy effective upon adoption of this Order. The commenters have not persuaded us otherwise.44

B. OWNERSHIP OF CELLULAR SYSTEMS

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44 Our previous policy which required that wireline notifications of completion of construction (FCC Form 489) appear on public notice for 14 days before the carrier started providing service to the public is accordingly eliminated. See Common Carrier Public Mobile Services Information- Initial Wireline License Applications, Public Notice, Report No. CL-88-118 June 2, 1988).

101. We proposed that no person have any direct or indirect ownership interest in licensees for both frequency blocks in overlapping CGSAs unless such interests pose no substantial threat to competition. We also sought comment on a rational percentage ownership standard that would define when there was no threat to competition.

1. COMMENTS

102. BellSouth agrees with the proposals contained in the NPRM. McCaw and Nynex believe that the public interest requires an absolute ban on cross-ownership of cellular competitors in the same market in order to preserve facilities-based competition, which in turn fosters important public benefits of diversity of technology, service and price. Ameritech states that under the broadcast multiple ownership rules a 5% or more interest is an attributable interest45 and recommends that the Commission adopt this 5% threshold as an ownership interest that presumptively would pose no threat to competition. This proposal, Ameritech argues, would provide assurance that a single entity could not exert economic or other influence over both cellular licenses. McCaw argues that if the Commission decides to establish a minimum cross ownership interest, a one percent interest level is more rational and appropriate.46 Contel believes the rules should give licensees a transition period following an acquisition within which to divest one of the interests that violate the cross-ownership requirements in order to avoid having to sell an interest below market value as a precondition to consummating an acquisition.47

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45 See 47 C.F.R. Section 73.3555; Attribution of Ownership Interests, 97 F.C.C. 2d 997 (1984), recon., 58 Rad. Reg. 2d (P&F) 604 (1985), further recon., 1 FCC Rcd 802 (1986).

46 Citing Comark Cable Fund III v. Northwestern Indiana Tel. Co., Inc., 103 FCC 2d 600, 608 n. 17 (1985) remanded on other grounds, 824 F.2d 1205 (D.C. Cir. 1987), for the proposition that the Commission has emphasized that the attribution standards have always been much more stringent for common carriers than for broadcast stations.

47 In late filed comments Jonathan Blake recommended that the Commission adopt a case-by-case approach and make clear that where one entity controls one cellular licensee and has a greater than 5% interest in the other, the Commission will employ a rebuttable presumption that the cross-interest is prohibited. But if the second interest is 5% or less, the cross-ownership should be presumed to be permissible, unless there would be a significant flow of confidential information to the cross-owner or the cross-owner would exercise significant influence or control over the management of the second licensee. See Ex Parte Comments of Jonathan Blake and Francis Hawkins, Jr. (July 23, 1990). We disagree with this proposal because it is not sufficient to preclude anticompetive

2. DISCUSSION

103. As we stated in the NPRM, in a service where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block licensee in the same market. In Cellular Systems, 86 F.C.C. 2d at 491-92, the Commission stated: "Thus, with two licensees per market, it will be more difficult for a single entity to dominate the cellular market nationwide."

104. In order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems, we will require that no person have a direct or indirect ownership interest in licensees for both frequency blocks in overlapping CGSAs unless such interests pose no substantial threat to competition. Therefore, we will require that a licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for one frequency block in a CGSA may not own any interest in the licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for the other frequency block in an overlapping CGSA. We also conclude that for less than controlling interests or interests less than 50% in both frequency blocks an analysis will have to be made on a case by case basis in accordance with traditional antitrust principles. If the interests pose a substantial threat to competition, they will not be allowed. See Section 22.902.

105. However, we disagree with McCaw that there should be an absolute ban on any multiple ownership interests. We conclude that in those situations involving less than a controlling interest in both licensees, there is no substantial threat to competition. We believe that a 5% ownership interest in both systems in overlapping CGSAs would pose no substantial threat to competition.48 We are not convinced that McCaw's 1% proposal is more rational or appropriate. Therefore, a direct or indirect ownership interest of 5% or less in two competing systems will be excluded from the general rule prohibiting multiple ownership interests. We are convinced that a less than five percent owner in both systems is unlikely to affect competition in a given market.

106. We also find that licensees should have sufficient time prior to consummation of the acquisition to divest interests which violate the ownership rules. Given the anticompetitive dangers inherent in cross-owenrship, we reject Contel's proposal that the rule give licensees a

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consequences which may arise in cross-system ownership.

48 The 5% exception would not apply in cases where a person owns less than 5% of the licensee but nonetheless actually controls the licensee.

transition period in which to divest a system to comply with this rule. However, we will consider on a case-by-case basis requests to extend the time period for consummating a transfer of control in order to avoid fire sale transactions.

C. DE MINIMIS 39 dBu CONTOUR EXTENSIONS

107. We proposed to adopt a rule applicable to all cellular applications designed to avoid disputes between cellular licensees in cases of de minimis 39 dBu contour extensions. In cases of disputes over 39 dBu contour interference to MSA or RSA licensees that occur during the fill-in period in the market into which a contour extends, the licensee with the 39 dBu contour extension will have to change frequencies in those cells or pull back its 39 dBu contour to eliminate the interference due to the extension. Moreover, 39 dBu contour extensions into areas where the five-year fill-in period has not expired will not be protected from interference. After the five-year fill-in period expires, any licensee whose 39 dBu contour covers an extension area will have interference protection in the extension area, and this area will automatically become part of this licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the fill-in period. Commenters supported the proposal. Cybertel proposes that the rule state that extending licensees have coordination responsibilities and that the adjacent market licensee has the obligation to take into account the existence of extension areas as well as actions previously taken by the extending licensee in formulating modifications to the adjacent system.

108. We will adopt the rule applicable to all cellular applications, as proposed. We believe this rule will avoid disputes concerning de minimis 39 dBu contour extensions for all existing and future licensees. For areas where the fill-in period has not expired, we reiterate what we stated in the NPRM that if the MSA or RSA licensee has not tried to serve the extension area covered by the other carrier, we should not impose barriers against the extending licensee. The licensee with the 39 dBu contour extension should be protected after the fill-in period expires (see para. 107, supra) since it is already capable of providing service in the extension area.

109. With this rule we are not adding new requirements for existing licensees or changing the terms of their authorizations since authorizations have been granted with a more restrictive condition in the past.[49] Licensees

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49 This condition is as follows: "This authorization does not include the right to any interference protection in any areas outside the MSA/RSA and is also conditioned upon coordinating with the current or future co-channel licensee(s) in the areas outside the MSA/RSA. The licensee is herein put on notice that in the event the current or future MSA/RSA licensee encounters interference from the extension(s), the licensee herein will have to change frequencies in those cell(s) or pull back their 39 dBu contour to eliminate the interference due to the extension."

have been on notice of the policy that the de minimis 39 dBu extensions were not protected from interference. See Cellular Systems, 89 F.C.C. 2d at 87. See also Public Notice, Cellular Application Filing Procedures-An Update, Mimeo No. 567 (November 1, 1982).

D. FINANCIAL SHOWINGS

110. We proposed to eliminate the requirement that financial showings be filed in support of modified facilities in any MSA or RSA market. Several parties agree with this proposal, and no one opposed it.

111. We will adopt the proposal. The commenters agree that this requirement is an unnecessary burden on licensees and delays the provision of cellular service to the public. Moreover, as we stated in the NPRM, existing licensees have already submitted a financial showing to the Commission for their operating systems. In addition, our experience in processing modification applications demonstrates that the financial qualifications of applicants is generally not a matter of controversy.

E. OTHER CHANGES

112. We also proposed to clarify and add some definitions to the rules. Additionally, we sought further comments on any alternatives or other procedures or policies which could be adopted.

113. We will adopt our proposals stated in paragraph 72 of the NPRM, to amend certain rules (Section 22.43 to eliminate "ready for operation" and Section 22.921 to eliminate references to "non-MSA/non-NECMA areas") and adding certain definitions (fill-in applications, fill-in period, initial cellular application, Metropolitan Statistical Areas, non-initial cellular applications and unserved areas) to Section 22.2.

F. CHANGES PROPOSED BY COMMENTERS

1. SECTION 22.903(a)

114. Ameritech recommends that the Commission amend Section 22.903(a) of the Rules, 47 C.F.R. Section 22.903(a), to authorize the use of a single cell to serve multiple service areas (MSAs, RSAs and/or unserved areas).

115. We agree with Ameritech's recommendation and are explicitly codifying it in the rules. Ameritech's proposal is not prohibited under the current rules, but confusion has been created because the policy is not explicitly codified. Therefore, we will place specific permission in the rules to permit a single cell to serve multiple markets. We agree that this

will create economies of scale and service efficiency in the adjacent market. However, the new area cannot be used to satisfy the coverage requirements for an MSA or RSA market not included in the new area. See Section 22.903 (a) of the rules. Additionally, the unserved area applicant must make its own independent showing meeting the coverage requirement we are adopting in this rulemaking. We will jointly license systems where two carriers in different markets agree to use one cell to serve areas in both markets.

2. CONSOLIDATION OF CGSAS

116. McCaw and Telocator suggest that the Commission adopt rules allowing the staff automatically to consolidate a CGSA extension with the permittee's existing adjacent CGSA, upon grant of the extension application. McCaw argues that without such a policy, existing licensees who received an authorization for an adjoining CGSA would be forced to file a separate application requesting consolidation, a needless expenditure of time by both the licensee and the Commission.

117. We conclude that this is a good recommendation and are adopting this procedural change.50 Therefore, the licensee of an adjacent CGSA will have that adjacent CGSA consolidated if it requests such action in the application for the new CGSA, the CGSAs to be consolidated are in the same market, and if it pays the appropriate fee for the consolidation request in addition to the fee for the application.

3. OTHER PROPOSALS NOT ADOPTED

118. McCaw states that given the proximity of existing cellular systems and inaccuracies in the Carey propagation model incompatibility between adjacent systems is a great concern. In addition, unserved area applications, according to McCaw, will likely represent unique technical proposals and the applicant's judgment that demand in an area warrants service. In order to deter speculators McCaw and other parties propose that unserved area applications include a demonstration of frequency compatibility with adjacent service areas and be required to have independent engineering proposals (not mass marketed). Cybertel recommends that unserved area applications demonstrate a seamless integration with existing systems.

119. Although, we agree with McCaw's concerns, our current rules are adequate to remedy interference problems. Therefore, we do not need any additional requirements at the application process stage requiring applicants to show frequency compatibility. See Section 22.924. We have rules establishing that licensees have to coordinate to avoid interference problems. We expect that all licensees will cooperate fully in these coordination

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50 See Section 553 (b)(A) of the Administrative Procedure Act, 5 U.S.C. Section 553(b)(A) (procedural change exception to notice requirement).

efforts. These coordination requirements have worked well in the past, and we do not forsee that future problems will arise. The rules we are adopting should discourage speculation. McCaw's proposal for independent engineering is unnecessary and therefore we do not adopt it. Although we favor nationwide cellular service, we believe the system integration proposal is vague. Moreover, the industry appears to be working to achieve this goal and we fail to see how seamless cellular service could be promoted further merely by requiring such a showing in unserved area applications.

120. In order to deter speculative applications various commenters had a number of additional proposals. They argue that the Commission should: (1) augment the site availability requirements for unserved area applications by requiring a certification that the proposed site in fact is available for use; (2) require all applicants to submit an exhibit identifying the owner or representative of each property where a cell site is proposed, including address and telephone number, and the identity of the specific individual who has provided reasonable assurance of the availability of the antenna site, plus additional information concerning the reasonable assurance given; (3) require applicants to submit a substantial showing of unmet need for cellular service in the proposed CGSA; (4) require applications to demonstrate the economic value of serving the unserved area to be acceptable for filing; and (5) require applications to include a showing that the applicant has some demonstrated level of experience or other capabilities, thus providing assurance that it can construct and operate a cellular system.

121. We reject all of the above proposals. Our current rules are clear on the requirements of site availability. Applicants are required to demonstrate reasonable assurance that it can use its proposed site. See Section 22.15 (a)(1). This requirement has been in effect for a number of years and the case law clarifies the requirements.51 We believe it is not necessary to augment the site availability requirements because they are unnecessary and will not deter speculation. In addition, in cellular there is a presumption of need for service, see Cellular Systems, 86 FCC 2d at 502, so demonstration of unmet need is unwarranted. The financial requirements for unserved areas will be essentially the ones used for RSAs and we believe that those requirements will deter speculation. Therefore, we believe it is unnecessary to require applicants also to demonstrate the economic value of serving the unserved area. McCaw has not demonstrated why its eligibility

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51 See Millard V. Oakley, 42 RR 2d 1495 (1978); Sampson Broadcasting Co., 52 FCC 2d 954, 959 (1975); Lorenzo W. Milan & Jeremy Lansman, 4 FCC 2d 610 (1966), aff'd sub nom., Christian Fundamental Church v. FCC, 12 RR 2d 2116 (D.C. Cir. 1968). See e.g., Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 4 FCC Rcd 4780 (1989), recon. granted in part, 5 FCC Rcd 3911 (1990), recon. pending; Revision and Update of Part 22, 95 FCC 2d 769, 777-79 (1983), recon., 101 FCC 2d 799 (1985), further recon., 2 FCC Rcd 1798 (1987).

proposal is necessary to protect against speculators in light of the other application requirements we have adopted. On balance, the proposals would increase application burdens without producing significant countervailing public interest benefits.

4. OTHER PROPOSALS DEFERRED

122. McCaw recommends that the Commission adopt additional procedures specifically designed to prevent speculation, prohibit payments made to withdraw applications. McCaw also recommends that the Commission adopt rules concerning extensions over water, so that such extensions become part of the CGSA regardless of whether the MSA or RSA itself encompasses such water areas.

123. We find that the proposals are valid recommendations beyond the scope of the notice of proposed rulemaking and, therefore, we are making them part of the Further Notice being issued in this proceeding.

VI. CONCLUSION

124. The policy revisions and rules adopted in this Report and Order advance our goals of expediting the provision of cellular service while reducing abuse of our licensing process.

VII. ORDERING CLAUSES

125. Authority for the rule changes adopted herein is contained in Section 4(i) and (j) and 303(r) of the Communications Act of 1934, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r).

126. Accordingly, IT IS ORDERED THAT Parts 1 and 22 of the Commission's Rules and Regulations ARE AMENDED as set forth in the attached Appendix, effective 90 days after publication in the Federal Register, except for Section 22.925 which is effective 60 days after publication.

127. IT IS FURTHER ORDERED THAT the Petitions for Reconsideration file by JAJ Cellular & McElroy Electronics Corp. ARE DENIED and the Order on Reconsideration of Second Report & Order IS AFFIRMED.

128. IT IS FURTHER ORDERED THAT the proceeding in CC Docket No. 85-388, Amendment of the Commission's Rules for Rural Cellular Service, IS TERMINATED.

129. IT IS FURTHER ORDERED THAT the Petitions for Reconsideration filed by various parties ARE DENIED and the Order Cellular Application for Unserved Areas in MSAs/NECMAs, 4 FCC Rcd 3636 (Com. Car. Bur. 1989), IS AFFIRMED.

130. For further information contact, Carmen Borkowski, Mobile Services Division, Common Carrier Bureau at (202) 632-6450.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX A

List of Parties Filing Pleadings/April Order:

JAJ Cellular
McElroy Electronics Corp.,
Roanoke Valley Cellular Telephone Company;
PriCellular Corp.
CGSA Cellular Partnership-Minneapolis, CGSA Cellular Partnership-Denver, CGSA Cellular Partnership-RI, Cellular Partnership-DC and CGSA Cellular Partnership-Phoenix
U.S. West/NewVector Group, Inc.(did not have applications dismissed but claimed standing based on injury from being prevented from filing fill-in applications after the five-year fill-in period expired)
Fort Mojave Telecommunications, Inc.
Warren Communications
Los Angeles SMSA Limited Partnership
Delta Satellite Corp.
Leonard Communications, Inc. and S+S Partnership.
Rockland Investments, Inc. filed a letter requesting reinstatement of its dismissed applications.
Bauce Communications filed comments in support of the JAJ and McElroy petitions.
Metro Mobile filed comments in support of the April Order.

List of Parties Filing Comments/Rulemaking Proceeding

Nynex Mobile Communications Company (Nynex)
Ameritech Mobile Communications, Inc. (Ameritech)
Bruce B. Blais, P.E. (Blais)
McCaw Cellular Communications, Inc. (McCaw)
Rochester Telephone Mobile Communications, Inc. (Rochester)
Alliance of Cellular System Operators (Alliance)
Teletech, Inc. (Teletech)
Snet Cellular, Inc. (Snet)
PMN, Inc. (PMN)
Syracuse Telephone Company & Utica Telephone Company (Syracuse & Utica)
Alltel Mobile Communications, Inc. (Alltel)
JAJ Cellular (JAJ)
Merrimack Telecommunications Corp. (Merrimack)
Associated Communications Corp. (Associated)
RVC Services, Inc. d/b/a Coastel Communications Co. (Coastel)
Century Telephone Enterprises, Inc. & Century Cellunet, Inc. (Century)
Pactel Cellular (Pactel)
BellSouth Cor, BellSouth Enterprises, Inc., BellSouth Mobility Inc. & American Cellular Communications Corp., (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
SouthWestern Bell Mobile Systems, Inc. (SouthWestern)

Petroleum Communications, Inc. (PetroCom)
Vanguard Cellular Systems, Inc. (Vanguard)
Cybertel Cellular Telephone Co. (Cybertel)
Centel Cellular Company (Centel)
McElroy Electronics Corp. (McElroy)
United States Telephone Association (USTA)
GTE Mobilnet Inc. (GTE)
Century Communications Corp. & Metro Mobile CTS, Inc. (Century & Metro Mobile)
Bell Atlantic Mobile Systems, Inc. (BAMS)
Contel Corp. (Contel)
Cellular Information Systems, Inc. (Cellular Information)
U.S. West NewVector Group, Inc. (NewVector)
Telocator (Telocator)
Cellular Communications, Inc. (Cellular Communications)

Reply Comments

BAMS
CTIA
Contel
Pactel
Cellular Communications
McCaw
Nynex
National Telephone Cooperative Association (NTCA)

APPENDIX B

VII. FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice Of Proposed Rule Making in CC Docket No. 90-6. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested. The Commission's final analysis is as follows:

I. Need and purpose of this action:

We are adopting rules for the processing of applications for unserved areas in the cellular radio service, and to amend various other rules which need further clarifications or modifications. Our objective has been to establish procedures for application filing, processing and selection which have not heretofore been established.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

A number of parties suggested modifications to the proposals set forth in the Notice. As a result, we have modified our proposals as appropriate.

III. Significant alternatives considered:

We have reduced burdens wherever possible. The burdens we have retained are necessary in order to ensure prompt service to the public and bona fide applicants.

APPENDIX C

FILING PROCEDURES

131. For Phase I, within 90 days after the publication in the Federal Register of rules in this proceeding, we will accept applications for unserved areas in markets and for frequency blocks where the fill-in period has already expired and markets in which the fill-in period will end 90 days after the publication of rules in this proceeding. The dates for filing in these markets will be announced by public notice. For markets in which the fill-in period ends after 90 days after publication of the rules, the filing window will not be announced by public notice. Rather, the filing window will be on the 31st day after the end of the fill-in period.52 Any applications filed before this one day window will be dismissed as untimely filed. Any applications filed after this one day period will be dismissed as untimely filed (unless there are no applications filed during the filing window, in which case they will be treated for processing purposes as Phase II applications). For applications filed in Phase I, the system proposals must be contained within existing MSA and RSA geographical boundaries.53

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52 Appendix E to this order identifies the construction permit dates for all MSA markets in which construction permits have been granted. A further public notice will be issued to provide information for RSAs and markets granted after this first public notice is issued. For purposes of computing the time for filing unserved area applications we will follow the provisions of Section 1.4 of the Rules for determining when the fill-in period expires. In addition, we are clarifying that in RSAs which have been partitioned to two or more licensees with construction permits issued on different dates the five-year fill-in period will be determined from the date the initial construction authorization was granted for that frequency block in the MSA or RSA. This conforms Section 22.31(f) with our intent to provide all licensees with a protected fill-in period of five years which runs from the date of the initial construction authorization for each frequency block granted in the MSA or RSA. See Order on Reconsideration of Second Report and Order, 4 FCC Rcd at 5380 (1989).

53 Initial applications for unserved areas may propose de minimis extensions into adjacent markets in which the five-year fill-in period has not run. The extension area may not be counted as territory for purposes of the minimum area requirements of new Section 22.924 of the rules. Initial applications may contain an extension into a market in which the five-year fill-in period has not run where the unserved area applicant has a contract with the adjacent market license holder permitting that particular applicant to file for area within the adjacent market (hereinafter "contract extension"). Blanket contracts permitting a group of unserved area applicants to build in the adjacent market if a

Every application filed within a geographical boundary (MSA or RSA) will treated as mutually exclusive.

132. After a construction permit is granted for an unserved area in a particular market, the licensee will have up to one year to construct its proposed system. The initial Phase I licensee may file only one major modification application in its market, which modification must be filed within 90 days of the grant of the construction permit.54 The modification application may propose de minimis or contract extensions into an adjacent market under the same circumstances as permitted in note 5 supra.55 The modification application may propose a CGSA which is not contiguous with the authorized or proposed CGSA only if the noncontiguous CGSA meets the minimum area requirement of Section 22.924. We will not accept applications which are mutually exclusive with the modification application filed by the unserved

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construction permit is awarded for the unserved area will not be allowed as contract extensions. A blanket contract signed by a licensee/permittee in an adjacent market where the fill-in period has not run, agreeing to permit an extension by anyone who wins the lottery in the adjacent unserved area, would promote the filing of speculative applications in the unserved area. It would be akin to the bank letters addressed "to whom it may concern," that have not been allowed by the Commission See e.g. Multi-State Communications, Inc. v. FCC, 590 F. 2d 1117 (D.C. Cir. 1978), cert. denied, 440 U.S. 959(1979). Round IV Cellular Applications, Order on Reconsideration, FCC 86-46, Mimeo No. 36444, para. 14, (released January 24, 1986). Extensions into an adjacent market pursuant to contract may be counted towards meeting the minimum area requirements for unserved area applications. During the initial filing window phase, applications may not propose any extension, de minimis or otherwise, into an adjacent market in which the five-year fill-in period has run prior to the time the unserved area application is filed.

54 During the construction period the licensee may also file minor modification applications to its system. However, these minor changes may not diminish the minimum area requirements of Section 22.924.

55 Of course, de minimis extensions do not entitle the applicant to interference protection. A contract extension into an adjacent market may be proposed in the modification application only if the licensee in the adjacent market possesses either the right to modify its system or the contract extension area is entirely contained within an authorized or proposed CGSA at the time the unserved area modification application is filed. The extension area in any event must be contiguous with the authorized or proposed, modified CGSA of the unserved area licensee.

area permittee.56 The filing of the modification application does not extend the construction deadline for completing the system as originally proposed. Failure to complete construction of the original proposal and to begin providing service to the public within 12 months of the original grant date will lead to automatic forfeiture of the entire authorization, including the modification proposal. The modification proposal must be completed within 12 months of the grant of the modification application. If construction is not completed and service is not provided to the public by this deadline, the authorization granting the modification proposal will be automatically forfeited. But see para. 96. Applications for any remaining unserved areas during Phase II will be accepted and granted on a first come, first served basis. Phase II applications may not be filed until the 121st day after a Phase I application construction authorization is granted.57 During the first 120 days no other applications to serve any areas in the market will be accepted.

133. In Phase II, applicants are not restricted to proposing service areas in one market.58 Applicants will file a separate application for each area they are interested in serving limited to one CGSA per application. If two or more applications are filed on the same day, in the first come, first served phase, they would be considered mutually exclusive if their CGSAs overlap in such a way that a grant of one would preclude the grant of the other application. We will allow applicants to amend their proposals to remove the mutual exclusivity if they do not create new conflicts with other pending applications or to show why their proposals could both be granted. If the mutual exclusivity is not eliminated the applications will be subject to the random selection procedures adopted in this order.

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56 Phase I unserved area licensees are not permitted to sell to a third party any right to file for a portion of an unserved area that the permittee may file for in its modification application period. If the Phase I licensee does not wish to serve a particular unserved area, the area can be filed for during Phase II licensing.

57 Of course, if there are no Phase I applications filed, Phase II applications may be filed beginning on the day after the Phase I filing window.

58 Phase II applicants may propose de minimis and contract extensions in accordance with guidelines outlined in note 2, supra.

APPENDIX D

FINAL RULES

Parts 1 and Part 22 of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 1- Practice and Procedure

1. The authority citation for Part 1 continues to read:

AUTHORITY: Sections, 4, 303, 48 Stat, 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 1.823 is amended by adding a new paragraph (b)(3) to read as follows:

Section 1.823 Random selection procedures for the Public Land Mobile and Domestic Public Cellular Radio Telecommunications Services.

* * * * *

(b) * * *

(3) Cellular Radio Telecommunications Service- Unserved Areas. In the Phase I licensing phase, petitions to deny must be filed within 30 days after the date of public notice announcing the tentative selectee. If the tentative selectee is qualified, the Commission will grant its application and dismiss the losing applications. If the tentative selectee's application cannot be granted, it will be either designated for hearing or dismissed. If the winning application is dismissed or ultimately denied another lottery will be held to select an application from the remaining applications. In the Phase II licensing phase, petitions to deny must be filed within 30 days from the date of public notice accepting the application for filing.

* * * * *

B. Part 22 - PUBLIC MOBILE SERVICE

1. The authority citation for Part 22 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U. S. C. 154, 303.

2. Section 22.2 is amended by adding the following new definitions in alphabetical order and revising the definitions for non-initial cellular applications and Rural Service Area to read as follows:

Section 22.2 Definitions.

* * * * *

Fill-in Application. Applications by initial cellular system licensees expanding their systems within Metropolitan Statistical Areas and Rural Service Areas during the five year fill-in period.

Fill-In Period. The time frame during which an initial cellular licensee can expand its system free from competing applications. This period commences from the date of the license grant (construction authorization) of each system and runs for five years.

Initial Cellular Applications. Original applications for cellular systems resulting in the first authorizations in a geographic area.

* * * * *

Metropolitan Statistical Areas (MSA). 306 areas including New England County Metropolitan Areas for the New England States (NECMA) defined by the Office of Management and Budget, as modified by the Federal Communications Commission, for which a common carrier may apply to provide cellular service. See Section 22.903. This definition also includes the Gulf of Mexico Service Area (water areas of the Gulf of Mexico, its border defined as the coastline).

* * * * *

Non-Initial Cellular Applications. Applications for modifications, transfer of control and assignment of authorizations for existing systems.

* * * * *

Rural Service Area (RSA). An area not included in a Metropolitan Statistical Area for which a common carrier may have a license to provide cellular service and which the Commission has specifically defined as an RSA.

* * * * *

Unserved Areas. Any area to which the Communications Act of 1934, as amended, is applicable and which is outside of an existing cellular geographic service area in a specific frequency block .

* * * * *

3. Section 22.6 is amended by removing paragraph (b)(3), adding paragraphs (b)(2) and new paragraph (d)(3) to read as follows:

Section 22.6 Filing of applications, fees and number of copies.

* * * * *

(b) * * *

(2) Cellular applications for unserved areas. In the Phase I licensing phase, cellular applications for unserved areas may be filed in a filing window, which occurs on the 31st day after the end of the fill-in period. On the 121st day after this authorization is granted, applications for any remaining unserved areas will be accepted for filing during Phase II on a first come, first served basis. If no applications are filed in Phase I, applications for unserved areas may be filed beginning the day after the end of the filing window and will be granted on a first come, first served basis.

(i) For markets whose fill-in periods expired before and 90 days after the publication of this rule in the Federal Register the filing window will be announced by Public Notice.

* * * * *

(d)(3) Cellular Applications for Unserved Areas. In Phase I applicants will file a master microfiche and one copy. The microfiche must depict the reduced 8.5" x 11" map (Application Exhibit II, See Section 22.924). The paper original of the application must be filed 7 days after the release of the public notice announcing the applicant as the lottery winner and include a full size map (Application Exhibit I, see Section 22.924).

(i) In Phase II applicants must file the paper original and a master microfiche plus two microfiche copies. The map on a scale of 1:250,000 and the reduced map must be included with the paper original (Application Exhibits I and II, see Section 22.924).

(ii) The original of the application must be enclosed in stiff covers and fastened securely along the left edge without exposed sharp edges (looseleaf binders, plastic binding strips, covered metal clasps).

(iii) Applications must include appropriate filing fees and must be filed according to Sections 0.401 and 1.1101 of the rules.

(iv) A copy of each unserved area application must be served on the licensees for the same frequency block of any adjacent systems whose CGSA, MSA or RSA boundaries are within 50 miles of the boundaries of the proposed system.

(v) All cellular applications for unserved areas must have the following information printed on the mailing envelope, the microfiche envelope and on the title area at the top of the microfiche:

(A) the name of the applicant
(B) market name(s) and market number(s)
(C) frequency block

* * * * *

4. Section 22.13 is amended by adding a new paragraph (a)(1)(iv) to read as follows:

Section 22.13 General application requirements

* * * * *

(a) (1) * * *

(iv) Initial cellular applicants must submit in the case of partnerships, the name and address of each partner, his citizenship and the share or interest participation in the partnership. This information must be provided for all partners, regardless of their respective ownership interests in the partnership. A signed and dated copy of the partnership agreement must be included in the application. This information must be included in Exhibit V of the application.

* * * * *

5. Section 22.31 is amended by revising paragraph (f) and adding paragraphs (a)(1)(ii) and (b)(2)(iii) to read as follows:

Section 22.31 Mutually Exclusive Applications

* * * *

(a)(1) * * *

(ii) Applications for Unserved Areas. In the Phase I licensing phase cellular applications for unserved areas will be considered mutually exclusive if they are within the same geographical boundary (MSA or RSA) and filed within a filing window which occurs on the 31st day after the end of the five-year fill-in period for a particular frequency block or pursuant to a Public Notice published by the Commission. See 47 C.F.R. Section 22.6(b)(2)(i). In the Phase II licensing phase, applications filed on the same day will be considered mutually exclusive if their CGSAs overlap in such a way that a grant of one would preclude the grant of the other application.

* * * * *

(b) * * *
(b)(2) * * *
(iii) Domestic Public Cellular Radio Telecommunications Service - Applications for Unserved Areas. In Phase I the applications must be filed within a filing window, which occurs the 31st day after the end of the five-year fill-in period for a particular frequency block or pursuant to a Public Notice published by the Commission. See 47 C.F.R. Section 22.6(b)(2)(i).

* * * * *

(f) Rural Service Areas. Applications by entities other than licensees or grantees for a particular RSA to serve unserved areas outside the presently authorized CGSA but within the Rural Service Area (RSA) will not be accepted for five years from the grant of the initial construction authorization of each frequency block in an RSA. During this five-year period the initial licensee will be authorized to expand its system into other areas of the RSA and competing applications will not be accepted.

(1) RSA licensees may allow other applicants to file inside the RSA during the five-year fill-in period.

(i) The applicant must enter into an agreement with an existing RSA permittee/licensee permitting the applicant to file in its market. The contract will specifically state the location of the applicant's CGSA and any expansion rights the RSA licensee cedes to the other party during the RSA licensee's five-year fill-in period. The applicant must file on a Form 401, which will be subject to the 30 day public notice period and petitions to deny.

(ii) The systems constructed by third parties will not satisfy the 18 months construction requirements of the RSA licensee.

* * * * *

6. Section 22.33 is amended by adding new paragraph (b)(3) to read as follows:

Section 22.33 Grants By Random Selection

* * * * *

(b) * * *

(3) Unserved Areas. Partial settlements among mutually exclusive applicants for unserved areas are prohibited. Full settlements among all mutually exclusive applicants in an unserved area are permitted and must be filed no later than 2 business days prior to the lottery.

* * * * *

7. Section 22.43 is amended by adding new paragraph (c)(2)(i) and (c)(4)(i) and revising paragraphs (c)(1) and (c)(2) to read as follows:

Section 22.43 Period of Construction

* * * * *

(c) (1) Cellular base stations,in markets 1-90, which will provide coverage over 75% of the cellular geographic service area, as defined in Section 22.903 of these rules, shall be completed and the station must provide service to the public within 36 months from the date the radio station authorization is granted.

(2) For systems beyond the top-90 markets, construction of an initial phase of the system, which may consist of one or more cells, must be completed, a notification on Form 489 that construction has been completed must be filed and service to the public must be provided, within 18 months from the date the radio station authorization is granted.

(i) Unserved Areas. Construction of the entire authorized system, which may consist of one or more cells, must be completed. a notification on Form 489 that construction has been completed must be filed and service to the public must be provided, within one year from the date the authorization is granted.

(A) Failure to complete construction of the original proposal and to begin providing service to the public within 12 months of the original grant date will cause the authorization automatically to terminate including any modification proposals authorized or under construction.

(B) The period to construct a major modification to an unserved area system will be one year from the grant date of the major modification application. This does not extend the time period in paragraph (c)(2)(i) above. Failure to provide service to the public pursuant to the modification proposal within 12 months of the grant of the modification application will cause the modification authorization automatically to terminate.

* * * * *

(c) (4) * * *

(i) Unserved Areas. Extensions of time to complete construction must meet the requirements of paragraph (b) of this section. If the licensee orders equipment and initiates state certification or other required proceedings within three months from the date of authorization a presumption of due diligence is created.

* * * * *

8. Section 22.902 is amended by adding new paragraphs (b)(3), (b)(4) (b)(5), (d)(4), and (d)(5) and revising paragraph (b) to read as follows:

Section 22.902 Frequencies

* * * * *

(b) For cellular systems the assignment of frequencies will be divided into two blocks. Assignments will be made from the frequencies listed for cellular systems A and B. For initial applications for MSAs and RSAs, common carriers not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular System A. Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market, for initial applications for MSAs and RSAs.

* * * * *

(3) In accordance with Section 22.31(a)(1)(i) and (f), after the five year fill-in period has expired for a particular frequency block, applicants may apply for this frequency block to provide service to unserved areas regardless of whether the applicant is a wireline or nonwireline carrier.

(i) The applicant shall indicate in its application the frequency block for which it is applying.

(4) In the Phase I licensing phase applications for unserved areas will be filed following MSA and RSA geographical boundaries. Applicants may file one application per market and one CGSA per application.

(i) The Phase I licensee may file one major modification application within 90 days of the grant of the authorization without being subject to competing applications. The modification application may propose de minimis or contract extensions into an adjacent market in accordance with the provisions of Section 22.903(f).

(A) A contract extension into an adjacent market may be proposed in a Phase I modification application only if the licensee in the adjacent market possesses either the right to modify its system or the contract extension area is entirely contained within an authorized or proposed CGSA at the time the unserved area modification application is filed. The extension area must be contiguous with the authorized or proposed, modified CGSA of the unserved area licensee. The major modification application may propose a CGSA which is not contiguous with the authorized or proposed CGSA only if the noncontiguous CGSA meets the minimum coverage requirements of Section 22.924. The Phase I licensee may also file minor modification applications to its system. However, the minor modification applications may not diminish the minimum area requirements of Section 22.924.

(1) We will not accept mutually exclusive applications with a modification application filed by the unserved area licensee. Phase I permittees/licensees are not permitted to sell to a third party any rights to file for a portion of an unserved area.

(2) One hundred and twenty one days after the Phase I license grant applications for any remaining unserved areas may be filed during Phase II and will be granted on a first come, first serve basis.

(3) In Phase II, applications are not restricted to service areas entirely contained within one MSA or RSA market. Applicants will file a separate application for each area they are interested in serving limited to one CGSA per application. Phase II applicants may propose de minimis and contract extensions in accordance with Section 22.903(f).

(5) Ownership of Cellular Systems. No person may have a direct or indirect ownership interest in licensees for both frequency blocks in overlapping CGSAs, unless such interests pose no substantial threat to competition. A licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for one frequency in a CGSA may not own any direct or indirect ownership interest in the licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for the other frequency block in an overlapping CGSA. A direct or indirect ownership interest of 5% or less in both systems is automatically excluded from the general rule prohibiting multiple ownership interests.

(i) Interests of less than 5% are considered and are not excluded from the rule prohibiting multiple ownership interests in cases of persons or entities who own a small percentage of the licensee but nonetheless actually control the licensee, a person who owns a controlling interest in the licensee, or a person who actually controls the licensee.

(ii) Divestiture of interests as a result of a transfer of control or assigment must occur prior to consummating the transfer or assignment.

* * * * *

(d) * * *

(4) Authorizations with de minimis 39 dBu contour extensions do not include the right to interference protection against the licensee of an MSA or RSA in which the five year fill-in period has not yet expired. During this period licensees must coordinate with the current or future co-channel licensee(s) in the areas outside the MSA/RSA. In the event the current or future MSA/RSA licensee encounters interference from another licensee's 39 dBu contour extension during the fill-in period, the licensee with the 39 dBu contour extension will have to change frequencies in those cells or modify its system to eliminate the 39 dBu contour extension causing the interference. After the five year fill-in period expires in an area into which a contour extends, the licensee whose 39 dBu contour covers the extension area will have interference protection in the extension area and this area will automatically become part of this licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the fill-in period, and that application is granted. Until such application is granted, if at all, the licensee with the de minimis extension may continue to operate in the extension area subject to this paragraph.

(5) Licensees constructing systems must initiate coordination no later than 60 days prior to the scheduled effective date of any changes to the frequency plan on file with the Commission.

* * * * *

9. Section 22.903 is amended by adding new paragraphs (a)(1)(i) and (f) to read as follows:

Section 22.903 Cellular System Service Areas

(a) * * *

(1) * * *

(i) A single cell can be used to serve multiple markets.

(A) The cell located in another market may not be used in meeting the geographic coverage requirements for an MSA, RSA or unserved area market.

* * * * *

(f) Unserved Areas. While geographic boundaries are retained, unserved area applications will not be allowed to have 39dBu contours extending beyond the borders of the MSA or RSA, except that a de minimis contour extension may be requested in accordance with paragraph (1) below. Applications filed during Phase I or II cannot have any extensions, even de minimis 39dBu contour extensions into an existing licensee's CGSA for the relevant frequency block or which extend into an MSA or RSA in which the five-year fill-in period has already expired before the filling of the unserved area application. Within the CGSA, the applicant must depict each base station site and its respective 39 dBu contour as determined by the methods described in paragraph (c) of this section. An applicant must state that the combined 39dBu contours of all base stations will cover at least 75% of the total CGSA.

(1) Applicants may file a waiver request for a de minimis extension of 39 dBu contours into an adjacent MSA or RSA in which the five-year fill-in period has not expired with an engineering justification indicating that the system is designed only to serve the areas within the boundaries of the applicant's CGSA, and that the extension is unavoidable because of irregular terrain or an unusual MSA or RSA boundary. An alternative engineering showing without the de minimis extension must be filed with the waiver request. Failure to comply with these requirements and the requirements of Section 22.19 will render the extension proposal defective.

(i) Authorizations including any such de minimis contour extensions do not have interference protection against the licensee of an MSA or RSA in which the five-year fill-in period has not yet expired. Before the five-year fill-in period expires, if the frequencies chosen for a 39 dBu contour extension or any other technical problem cause interference to an existing

MSA or RSA licensee, the licensee granted the waiver for a 39 dBu contour extension will have to change frequencies in those cells or modify its system to eliminate the 39 dBu contour extension causing the interference. After the five-year fill-in period expires, any unserved area licensee whose 39 dBu contours covers an extension area will have interference protection in the extension area, and this area automatically becomes part of this licensee's CGSA, unless the existing licensee files an application to serve the extension area prior to the expiration of the fill-in period and that application is granted. Until such application is granted, if at all, the unserved area licensee may continue to operate in the extension area subject to this paragraph.

(ii) The de minimis extension area may not be counted as territory for purposes of the minimum area coverage requirements of Section 22.924.

(2) Initial applications filed during Phase I and Phase II may contain an extension into a market in which the five-year fill-in period has not run by contract with the adjacent market licensee, allowing the unserved area applicant to file for area within the adjacent market (contract extensions). Contract extensions into an adjacent market may be counted towards meeting the minimum area coverage requirements for unserved area applications.

(i) A licensee in a market where the five-year fill-in period has not run may file for an area which includes both an unserved area and a portion of its market.

10. Section 22.916 is amended by revising paragraph (c) to read as follows:

Section 22.916 Evaluation of Cellular Applications

* * * * *

(c) Evaluation of cellular applications. Mutually exclusive cellular applications shall be randomly selected according to the procedures set forth in Section 22.33 and 1.822 et. seq.

11. Section 22.917 is amended by removing paragraph (b)(2), revising paragraph (a) (1) and adding new paragraph (f) to read as follows:

Section 22.917 Demonstration of Financial Qualifications

(a) * * *

(1) Applications for new cellular systems shall demonstrate the applicant's financial ability to meet the realistic and prudent:

* * * * *

(f) Unserved Areas. Except as provided in paragraph (10), all applicants for initial unserved area (both wireline or nonwireline carriers) systems

are required to have a separate market specific firm financial commitment for each unserved area application filed. In addition, all applicants are required to comply with the following requirements:

(1) An applicant shall demonstrate, at the time of filing an application for an initial unserved area system that it has either a firm financial commitment or available financial resources necessary to construct and operate for one year its proposed cellular system. The firm financial commitment may be contingent on the applicant obtaining an authorization.

(2) The demonstration of commitment must include and be sufficient to cover the realistic and prudent estimated costs of construction, operating and other initial expenses for one year.

(3) The firm financial commitment required above shall be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution, or the financial arm of a capital equipment supplier and shall contain a statement that the lender -

(i) has examined the financial condition of the applicant including audited financial statements where applicable, and has determined that the applicant is creditworthy;

(ii) that the lender has examined the financial viability of each proposal for which the applicant intends to use the commitment;

(iii) that the lender is committed to providing a sum certain to the particular applicant;

(iv) that the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and

(v) that the commitment is not in any way guaranteed by any entity other than the applicant.

(4) Applicants intending to rely on personal or internal resources must submit -

(i) audited financial statements certified within one year of the date of the cellular application, indicating the availability of sufficient net current assets to construct and operate the proposed cellular system for one year;

(ii) a balance sheet current within 60 days of the date of filing that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed cellular system for one year; and

(iii) a certification by the applicant or an officer of the applicant organization attesting to the validity of the unaudited balance sheet.

(5) Applicants intending to rely upon financing obtained through the parent corporation must submit the information required by paragraphs (6)(i)

through (iii) of this section as the information pertains to the parent corporation.

(6) Each application for an assignment of a license (or permit), or for the transfer of control of a corporation holding a license (or permit), shall demonstrate the financial ability of the proposed assignee or transferee to acquire and operate the facilities by submitting adequate financial information under the guidelines specified in this section, as appropriate.

(7) Notice Upon Default. In addition to the disclosures required by paragraph (8) of this section, any loan or other credit arrangement providing for a chattel mortgage or secured interest in any proposed radio station facility must include a provision for a minimum of ten (10) days prior written notification to the licensee or permittee, and to the Commission, before any such equipment may be repossessed under default provision of the agreement.

(8) Licensees proposing to serve an unserved area adjacent and integrated to its system need not comply with the requirements of paragraph (f).

12. Section 22.918 is amended by redesignating paragraph (c) as paragraph (d) and revising it and adding new paragrah (c) to read as follows:

Section 22.918 Amendment of Cellular Applications

* * * * *

(c) Unserved Areas. In the Phase I initial licensing phase applicants for unserved areas may not file major amendments. No amendments may be filed prior to conducting the lottery. Minor amendments and amendments under Section 22.23(g), except (g)(2), may be filed by the tentative selectee. Information required by Section 1.65 must be filed within 30 days of public notice announcing the lottery results.

(1) In the Phase II first come, first served licensing phase minor amendments and amendments under section 22.23(g)(2), to resolve frequency conflicts and to show that the mutually exclusive proposals could be granted, without causing new or increased frequency conflicts, and without increasing the 39dBu contours proposed in the applications, may be filed.

(i) Frequency changes (use of signalling or voice channels) within the frequency block originally filed for, to resolve interference conflicts between systems are permitted.

(ii) Applications for unserved areas filed during either Phase II, proposing to change frequency blocks will be considered newly filed.

(d) Notwithstanding the general cellular amendment rules specified in paragraphs (a),(b) and (c) of this section, the amendments described in this subsection may be filed as specified below:

(1) Amendments in connection with full settlement agreements under '22.29 of the rules may be filed no later than two business days prior to the lottery date. Partial settlements, where permitted, resulting in a merger of interests between two or more mutually exclusive parties may be filed at any time.

(2) Amendments requested by the Commission or the Administrative Law Judge may be filed at any time.

(3) After an application is designated for hearing, amendments may be filed for good cause upon leave of the presiding officer.

13. Section 22.920 is amended by adding new paragraph (c) to read as follows:

Section 22.920 Considerations Involving Transfer or Assignment Applications for Cellular Authorizations

* * * * *

(c) Unserved Areas. Authorizations for unserved areas cannot be transferred or assigned prior to the licensee providing service to the public for one year.

(1) Licensees may not enter into any agreements (for example, option agreements or management contracts) to transfer control of the license of the system before or during its first year of operations even if the transfer will take place after the first year of operation.

(2) Pro forma assignments or transfers of control will be allowed.

(3) Applications to transfer control filed during the initial one year of operation will be dismissed.

14. Section 22.921 is revised to read as follows:

Section 22.921 Ownership in Applications for Cellular Service For Markets Below the Top 90

(a) Markets 91-120. No party may have an ownership interest, direct or indirect, in more than one application for the same MSA market, except that interests of less than one percent will not be considered.

(b) Markets beyond the top-120 and Rural Service Areas. Except as otherwise provided herein, no party may have an ownership interest, direct or indirect, in more than one application for the same MSA except that interests of less than one percent will not be considered. For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

(c) Ownership interests in publicly-traded corporate applicants. Notwithstanding paragraphs (a) (b) and (d) of this section, no party may have an ownership interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations, except that interests of less than five percent will not be considered.

(1) Application. In applying the provisions of subsection (c), ownership and other interests in cellular applicants will be attributed to their holder and deemed cognizable as set forth below.

(i) Passive Investors. Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies, and banks holding stock through their trust departments in trust accounts will be deemed to have a cognizable interest in a publicly-traded cellular applicant only if they hold 10 percent or more of the stock of the applicant. This provision applies only if an applicant in which such parties hold an interest certifies in its application that no such party has exerted or attempted to exert any influence or control over the officers of the applicant.

(ii) Multiplier. Attribution of ownership interests in a publicly-traded cellular applicant that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50 percent, it shall not be included for purposes of this multiplication.

(d) Unserved Areas. A party to an application for an unserved area, shall not have an interest, direct or indirect, except as described in paragraph (c), including an interest of less than one percent, in more than one mutually exclusive application in the Phase I initial licensing phase and mutually exclusive proposals in Phase II. Existing licensees who own systems which abut an unserved area applied for may each file one application mutually exclusive with each other even though the applicants share common owners, except that these licensees cannot have interests in pending applications for both frequency blocks in the same geographic area at the same time.

15. New section 22.924 is added to read as follows:

Section 22.924 Content and Form of Applications for Unserved Areas

(a) Applications for unserved areas during Phase I may be filed within a filing window which occurs on the 31st day after the five-year fill-in period expires for each frequency block in each MSA and RSA or pursuant to a Public Notice published by the Commission. See 47 C.F.R. Section 22.6(b)(2)(i). On the 121st day after the licensee is awarded the authorization for the unserved area any remaining unserved areas may be applied for during Phase II on a first come, first served basis.

(1) Applications for unserved areas must propose a minimum geographical coverage of 50 contiguous square miles.

(2) Existing licensees do not need to meet the minimum coverage requirements of paragraph (a)(1) if they are proposing to serve an area contiguous to an existing system.

(b) Applications for unserved areas must be filed on FCC Form 401. The first page of the application after the cover, see '22.924(c)(1), must be the transmittal sheet, see '22.924(c)(2), and then a table of contents listing the exhibits contained in the application. The following exhibits, which will be set off by tabs must be submitted with the application, numbered as follows:

(1) Exhibit I- A full sized map.

(i) This map must be on a scale of 1:250,000. The map must have a legend, scale, latitude and longitude. This map must be clear, legible and have cell sites specifically plotted. It must depict with clear labelling, the entire CGSA, the 39 dBu contours, and the relevant portions of the RSA or MSA boundaries visible on the map. Regardless of the scale used to satisfy the requirements for the reduced map in Exhibit II, the 1:250,000 scale map must always be used to satisfy the requirements of Exhibit I.

(2) Exhibit II- An 8.5 inch by 11 inch reduced map.

(i) For this map applicants have a choice of reducing the full sized map in Exhibit I above. If it is impractical to depict the entire MSA or RSA on the map with a scale of 1:250,000, applicants may use a map with a scale of 1:500,000 or similar scale. The entire MSA or RSA must be depicted, clearly labeled, with the boundaries visibly marked. The map must show cell sites, CGSA boundaries, and the entire 39 dBu contours.

(3) Exhibit III- This exhibit must contain the engineering data and calculations used to derive the service contours. See Section 22.903(c).

(4) Exhibit IV - An exhibit indicating the frequency plan to be used if the application is granted.

(i) The frequency plan must include the number of frequencies at each cell site and the specific frequency(ies) or group from which the frequencies were taken and a frequency conversion table.

(5) Exhibit V- Ownership information in accordance with Section 22.13(a)(1). Individual applicants holding less than a 5% interest in a publicly held corporation that has filed a mutually exclusive application must disclose the fact that the corporation and the applicant both have filed mutually exclusive applications. This disclosure must include the applicant's percentage interest held in the company.

(6) Exhibit VI- An indication of the applicant's service proposals for local subscribers and roamers, including the method for handling complaints.

(7) Exhibit VII - An Exhibit setting forth how the proposal complies with the Commission's cellular design concepts, and indicating the applicant's projected method for coordinated expansion of the system in response to changing demand.

(8) Exhibit VIII - An indication of the basis which the applicant will use to determine whether sufficient congestion exists to warrant cell-splitting.

(9) Exhibit IX - Full particulars regarding the cost of construction and other initial expenses of the proposed facilities and demonstration of how the applicant intends to finance construction and other initial expenses and operation for one year. See Section 22.917.

(10) Exhibit X- If the applicant is providing public landline message telephone service in any portion of its proposed CGSA, it must indicate exactly how its proposed system would interconnect with the landline network. This information must be of sufficient specificity to enable a competitor to design its system to connect with the landline system in exactly the same manner if the competitor so chooses.

(c) Applications shall be filed as set forth below:

(1) Applicants are required to submit as the cover page of their applications (i.e., immediately inside the cover) a Transmittal Sheet For Cellular Applications for Unserved Areas. Copies of this transmittal sheet may be obtained by contacting the Consumer Assistance Office, Federal Communications Commission, 1919 M St., N. W., Washington, D. C. 20554. On the transmittal sheet applicants must list the name of the applicant, the market number or numbers and the market name or names in which the proposed unserved area is located and the frequency block. The information on the transmittal sheet must match exactly the information on the jacket of the microfiche and on the cover of the application.

(i) The transmittal sheet will include a certification. All applicants must certify to the following in their applications.

(A) I hereby certify that this application for a cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that, if upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration.

(B) I also certify that I am the real party in interest in this application and there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant has an indirect or direct interest in the application. I also certify that the applicant intends to construct and operate the station as proposed and that there are no agreements or understandings that are inconsistent with that intent.

(C) I declare, under penalty of perjury, that I am the authorized representative of the above named applicant in the above entitle matter,

that I have read the foregoing certification; and the matter and things therein stated are true and correct.

(D) Executed on _____
Applicant Signature_____
Print name _____
Title _____

(E) The certification must be signed in ink. No mechanical reproductions of signatures may be used. The certification must be dated and signed in accordance with the requirements of Section 1.743 of the Rules. The title of the person signing the certification must be indicated.

(2) The application, the filing fee, and the microfiche envelope shall be placed in a sealed envelope. The applicant's name, the market name and number and the frequency block, must prominently be displayed in the lower left hand corner of the envelope for all applications sent by mail and placed in the center of the envelope for hand delivered applications.

(3) Applications may only request one CGSA per application. The proposed CGSA may include multiple 39dBu contours per application.

(4) Notification to the FAA, if necessary, in Phase I must be undertaken at the time an applicant is announced by public notice as the lottery winner.

(i) In Phase II applicants will notify the FAA at the time they file their applications.

16. New section 22.925 is added to read as follows:

Section 22.925 System Informational Update

(a) Maps. Every cellular system licensee in an MSA and RSA must file with the Commission 60 days prior to the expiration of the five-year fill-in period in its market a map depicting existing 39 dBu contours and the CGSA, as well as the relevant portions of the MSA or RSA and any proposed modifications pending before or which have not been filed with the Commission. This map must be on a scale of 1:250,000. In addition, the map must have a legend, scale, latitude and longitude, it must be clear, legible and cell site must be specifically plotted. The map must also depict with clear labelling, the entire CGSA, the 39 dBu contours, and the relevant portions of the RSA or MSA boundaries visible on the map.

(1) In addition, licensees must file a reduced map showing the entire MSA or RSA. For this map applicants can reduce the full sized 1:250,000 scale map or if it is impractical to depict the entire MSA or RSA on the map with this scale, applicants may use a map with a scale of 1:500,000 or similar scale. The entire MSA or RSA must be depicted, clearly labeled, with the boundaries visibly marked. The map must show cell sites and the entire 39dBu contours. It must also clearly indicate the boundaries of the MSA(s) or RSA(s).

(2) These maps must be filed in triplicate at the Mobile Services Division office, Room 644, 1919 M St. N.W., Washington, D.C. 20554..

(3) If during the 60 day period there occur any changes to the system the licensee must file additional maps with these changes.

(b) Frequency Plan. An updated frequency utilization chart or frequency plan must be also submitted in accordance with paragraph (a).

(c) For all markets whose five-year fill-in period expired prior to and 90 days after the publication of this rule in the Federal Register, the maps required by paragraph (a) and the frequency plan required by paragraph (b) must be filed within 60 days after the publication of this rule.

17. New section 22.926 is added to read as follows:

Section 22.926 Maps

(a) All maps required to be filed by Subpart K shall:

(i) Except as otherwise provided in Section 22.924(b)(2), be on a scale of 1:250,000.

(ii) Include an effective date.

(iii) Indicate the scale, latitude and longitude.

(iv) Have a clear legend.

(v) Contours, the entire CGSA and the entire MSA or RSA or relevant portions thereof, must be clearly marked and identified in the map's legend.

(vi) Be clear, legible and have cell sites specifically plotted.

(vii) CGSAs and contours should be marked by the outside of the contour line, regadless of the line's width.

(viii) Maps on a scale of 1:250,000 must be submitted in duplicate. Duplicate copies of the maps on a scale of 1:250,000 must be submitted for each market in which the CGSA extends even if de minimis, showing the extension area in the adjacent market, marked and labeled for the adjacent market.

(b) In addition to the maps specified in Section 22.925, updated maps will also be required any time licensees change their CGSAs.

DATES OF INITIAL AUTHORIZATIONS BY MARKET NUMBER FOR METROPOLITAN STATISTICAL AREAS

Mkt Num	Market	Freq. Block	Date of Initial Authorization
1	New York, New York	A	Granted: 10/31/1984
1	New York, New York	B	Granted: 02/18/1983
2	Los Angeles, California	A	Granted: 12/04/1984
2	Los Angeles, California	B	Granted: 04/26/1983
3	Chicago, Illinois	A	Granted: 08/17/1983
3	Chicago, Illinois	B	Granted: 11/02/1982
4	Philadelphia, Pennsylvania	A	Granted: 12/31/1984
4	Philadelphia, Pennsylvania	B	Granted: 01/21/1983
5	Detroit, Michigan	A	Granted: 10/28/1983
5	Detroit, Michigan	B	Granted: 08/26/1983
6	Boston, Massachusetts	A	Granted: 05/16/1983
6	Boston, Massachusetts	B	Granted: 11/19/1982
7	San Francisco, California	A	Granted: 08/09/1984
7	San Francisco, California	B	Granted: 07/08/1983
8	Washington, D.C.	A	Granted: 11/18/1983
8	Washington, D.C.	B	Granted: 08/26/1983
9	Dallas, Texas	A	Granted: 12/03/1984
9	Dallas, Texas	B	Granted: 08/26/1983
10	Houston, Texas	A	Granted: 12/27/1984
10	Houston, Texas	B	Granted: 07/01/1983
11	St. Louis, Missouri/Illinois	A	Granted: 08/17/1983
11	St. Louis, Missouri/Illinois	B	Granted: 06/06/1983
12	Miami, Florida	A	Granted: 04/26/1985
12	Miami, Florida	B	Granted: 07/01/1983
13	Pittsburgh, Pennsylvania	A	Granted: 03/06/1984
13	Pittsburgh, Pennsylvania	B	Granted: 12/06/1982
14	Baltimore, Maryland	A	Granted: 11/18/1983
14	Baltimore, Maryland	B	Granted: 08/26/1983
15	Minneapolis-St. Paul, MN/WI	A	Granted: 11/25/1983
15	Minneapolis-St. Paul, MN/WI	B	Granted: 06/06/1983
16	Cleveland, Ohio	A	Granted: 10/14/1983
16	Cleveland, Ohio	B	Granted: 07/12/1983
17	Atlanta, Georgia	A	Granted: 01/18/1985
17	Atlanta, Georgia	B	Granted: 06/06/1983
18	San Diego, California	A	Granted: 03/08/1985
18	San Diego, California	B	Granted: 10/24/1983
19	Denver, Colorado	A	Granted: 01/18/1985
19	Denver, Colorado	B	Granted: 06/17/1983
20	Seattle-Everett, Washington	A	Granted: 08/08/1984
20	Seattle-Everett, Washington	B	Granted: 06/06/1983
21	Milwaukee, Wisconsin	A	Granted: 03/03/1983
21	Milwaukee, Wisconsin	B	Granted: 06/06/1983

22	Tampa, Florida	A	Granted: 04/26/1985
22	Tampa, Florida	B	Granted: 08/10/1983

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Mkt Num	Market	Freq. Block	Date of Initial Authorization
23	Cincinnati, Ohio	A	Granted: 01/09/1985
23	Cincinnati, Ohio	B	Granted: 06/06/1983
24	Kansas City, Missouri/Kansas	A	Granted: 02/19/1985
24	Kansas City, Missouri/Kansas	B	Granted: 07/08/1983
25	Buffalo, New York	A	Granted: 03/10/1983
25	Buffalo, New York	B	Granted: 12/14/1982
26	Phoenix, Arizona	A	Granted: 10/05/1984
26	Phoenix, Arizona	B	Granted: 01/31/1983
27	San Jose, California	A	Granted: 08/09/1984
27	San Jose, California	B	Granted: 05/06/1983
28	Indianapolis, Indiana	A	Granted: 03/03/1983
28	Indianapolis, Indiana	B	Granted: 06/06/1983
29	New Orleans, Louisiana	A	Granted: 12/31/1984
29	New Orleans, Louisiana	B	Granted: 07/11/1983
30	Portland, Oregon/Washington	A	Granted: 07/26/1984
30	Portland, Oregon/Washington	B	Granted: 05/09/1983
31	Columbus, Ohio	A	Granted: 01/28/1985
31	Columbus, Ohio	B	Granted: 10/03/1984
32	Hartford, Connecticut	A	Granted: 02/14/1985
32	Hartford, Connecticut	B	Granted: 12/08/1983
33	San Antonio, Texas	A	Granted: 01/30/1985
33	San Antonio, Texas	B	Granted: 10/09/1984
34	Rochester, New York	A	Granted: 01/30/1985
34	Rochester, New York	B	Granted: 10/09/1984
35	Sacramento, California	A	Granted: 02/14/1985
35	Sacramento, California	B	Granted: 10/09/1984
36	Memphis, Tennessee/Arkansas/Mississippi	A	Granted: 02/14/1985
36	Memphis, Tennessee/Arkansas/Mississippi	B	Granted: 04/04/1984
37	Louisville, Kentucky/Indiana	A	Granted: 10/11/1984
37	Louisville, Kentucky/Indiana	B	Granted: 12/08/1983
38	Providence-Warwick-Pawtucket, RI/MA	A	Granted: 09/21/1984
38	Providence-Warwick-Pawtucket, RI/MA	B	Granted: 12/08/1983
39	Salt Lake City-Ogden, Utah	A	Granted: 03/06/1985
39	Salt Lake City-Ogden, Utah	B	Granted: 04/26/1984
40	Dayton, Ohio	A	Granted: 02/27/1985
40	Dayton, Ohio	B	Granted: 10/03/1984
41	Birmingham, Alabama	A	Granted: 02/14/1985
41	Birmingham, Alabama	B	Granted: 08/24/1984
42	Bridgeport, Connecticut	A	Granted: 01/28/1985
42	Bridgeport, Connecticut	B	Granted: 06/21/1984
43	Norfolk-Va. Beach-Portsmouth, VA/NC	A	Granted: 02/01/1985
43	Norfolk-Va. Beach-Portsmouth, VA/NC	B	Granted: 10/09/1984
44	Albany-Schenectady-Troy, New York	A	Granted: 09/14/1984
44	Albany-Schenectady-Troy, New York	B	Granted: 12/08/1983

45	Oklahoma City, Oklahoma	A	Granted: 01/28/1985
45	Oklahoma City, Oklahoma	B	Granted: 08/31/1984

Mkt Num	Market	Freq. Block	Date of Initial Authorization
46	Nashville-Davidson, Tennessee	A	Granted: 01/30/1985
46	Nashville-Davidson, Tennessee	B	Granted: 10/03/1984
47	Greensboro-Winston Salem-High Point, NC	A	Granted: 02/19/1985
47	Greensboro-Winston Salem-High Point, NC	B	Granted: 10/04/1984
48	Toledo, Ohio/Michigan	A	Granted: 12/08/1983
48	Toledo, Ohio/Michigan	B	Granted: 10/19/1984
49	New Haven, Connecticut	A	Granted: 02/27/1985
49	New Haven, Connecticut	B	Granted: 12/08/1983
50	Honolulu, Hawaii	A	Granted: 02/27/1985
50	Honolulu, Hawaii	B	Granted: 12/21/1983
51	Jacksonville, Florida	A	Granted: 02/22/1985
51	Jacksonville, Florida	B	Granted: 10/24/1984
52	Akron, Ohio	A	Granted: 02/14/1985
52	Akron, Ohio	B	Granted: 10/03/1984
53	Syracuse, New York	A	Granted: 10/18/1984
53	Syracuse, New York	B	Granted: 12/08/1983
54	Gary-Hammond-East Chicago, Indiana	A	Granted: 01/30/1985
54	Gary-Hammond-East Chicago, Indiana	B	Granted: 09/24/1984
55	Worcester, Massachusetts	A	Granted: 02/27/1985
55	Worcester, Massachusetts	B	Granted: 12/08/1983
56	Northeast Pennsylvania, Pennsylvania	A	Granted: 03/29/1985
56	Northeast Pennsylvania, Pennsylvania	B	Granted: 10/03/1984
57	Tulsa, Oklahoma	A	Granted: 06/18/1985
57	Tulsa, Oklahoma	B	Granted: 10/25/1984
58	Allentown-Bethlehem-Easton, PA/NJ	A	Granted: 02/01/1985
58	Allentown-Bethlehem-Easton, PA/NJ	B	Granted: 10/15/1984
59	Richmond, Virginia	A	Granted: 02/04/1985
59	Richmond, Virginia	B	Granted: 10/04/1984
60	Orlando, Florida	A	Granted: 02/27/1985
60	Orlando, Florida	B	Granted: 05/10/1984
61	Charlotte-Gastonia-Rock Hill, NC	A	Granted: 03/01/1985
61	Charlotte-Gastonia-Rock Hill, NC	B	Granted: 10/16/1984
62	New Brunswick-Perth Amboy-Sayreville,NJ	A	Granted: 02/08/1985
62	New Brunswick-Perth Amboy-Sayreville,NJ	B	Granted: 09/26/1984
63	Springfield-Chicopee-Holyoke, MA	A	Granted: 01/30/1985
63	Springfield-Chicopee-Holyoke, MA	B	Granted: 04/19/1984
64	Grand Rapids. Michigan	A	Granted: 01/30/1985
64	Grand Rapids, Michigan	B	Granted: 10/17/1984
65	Omaha, Nebraska/Iowa	A	Granted: 02/08/1985
65	Omaha, Nebraska/Iowa	B	Granted: 09/21/1984
66	Youngstown-Warren, Ohio	A	Granted: 01/28/1985
66	Youngstown-Warren, Ohio	B	Granted: 09/13/1984
67	Greenville-Spartanburg, South Carolina	A	Granted: 02/22/1985
67	Greenville-Spartanburg, South Carolina	B	Granted: 11/01/1984
68	Flint, Michigan	A	Granted: 02/22/1985

68	Flint, Michigan	B	Granted: 10/18/1984
69	Wilmington, Delaware/New Jersey/Marylan	A	Granted: 01/30/1985
69	Wilmington, Delaware/New Jersey/Marylan	B	Granted: 10/15/1984

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Mkt Num	Market	Freq. Block	Date of Initial Authorization
70	Long Branch-Asbury Park, New Jersey	A	Granted: 01/30/1985
70	Long Branch-Asbury Park, New Jersey	B	Granted: 09/26/1984
71	Raleigh-Durham, North Carolina	A	Granted: 02/27/1985
71	Raleigh-Durham, North Carolina	B	Granted: 10/09/1984
72	West Palm Beach-Boca Raton, Florida	A	Granted: 02/19/1985
72	West Palm Beach-Boca Raton, Florida	B	Granted: 08/27/1984
73	Oxnard-Simi Valley-Ventura, California	A	Granted: 02/14/1985
73	Oxnard-Simi Valley-Ventura, California	B	Granted: 11/01/1984
74	Fresno, California	A	Granted: 02/28/1985
74	Fresno, California	B	Granted: 10/22/1984
75	Austin, Texas	A	Granted: 01/28/1985
75	Austin, Texas	B	Granted: 02/13/1984
76	New Bedford, Massachusetts	A	Granted: 02/14/1985
76	New Bedford, Massachusetts	B	Granted: 04/13/1984
77	Tucson, Arizona	A	Granted: 02/04/1985
77	Tucson, Arizona	B	Granted: 11/02/1984
78	Lansing-East Lansing, Michigan	A	Granted: 02/22/1985
78	Lansing-East Lansing, Michigan	B	Granted: 10/09/1984
79	Knoxville, Tennessee	A	Granted: 02/08/1985
79	Knoxville, Tennessee	B	Granted: 10/03/1984
80	Baton Rouge, Louisiana	A	Granted: 01/28/1985
80	Baton Rouge, Louisiana	B	Granted: 10/03/1984
81	El Paso, Texas	A	Granted: 01/28/1985
81	El Paso, Texas	B	Granted: 06/27/1984
82	Tacoma, Washington	A	Granted: 01/30/1985
82	Tacoma, Washington	B	Granted: 10/11/1984
83	Mobile, Alabama	A	Granted: 01/30/1985
83	Mobile, Alabama	B	Granted: 10/09/1984
84	Harrisburg, Pennsylvania	A	Granted: 01/30/1985
84	Harrisburg, Pennsylvania	B	Granted: 08/08/1984
85	Johnson City-Kingsport-Bristol, TN/VA	A	Granted: 02/01/1985
85	Johnson City-Kingsport-Bristol, TN/VA	B	Granted: 06/19/1984
86	Albuquerque, New Mexico	A	Granted: 02/14/1985
86	Albuquerque, New Mexico	B	Granted: 10/11/1984
87	Canton, Ohio	A	Granted: 01/28/1985
87	Canton, Ohio	B	Granted: 10/17/1984
88	Chattanooga, Tennessee/Georgia	A	Granted: 02/01/1985
88	Chattanooga, Tennessee/Georgia	B	Granted: 10/16/1984
89	Wichita, Kansas	A	Granted: 02/27/1985
89	Wichita, Kansas	B	Granted: 06/06/1984
90	Charleston-North Charleston, SC	A	Granted: 01/28/1985
90	Charleston-North Charleston, SC	B	Granted: 10/09/1984
91	San Juan-Caguas, Puerto Rico	A	Granted: 03/15/1988
91	San Juan-Caguas, Puerto Rico	B	Granted: 02/21/1986

92	Little Rock-North Little Rock, Arkansas	A	Granted: 02/05/1988
92	Little Rock-North Little Rock, Arkansas	B	Granted: 03/26/1986

Mkt Num	Market	Freq. Block	Date of Initial Authorization
93	Las Vegas, Nevada	A	Granted: 08/03/1987
93	Las Vegas, Nevada	B	Granted: 09/27/1985
94	Saginaw-Bay City-Midland, Michigan	A	Granted: 07/02/1987
94	Saginaw-Bay City-Midland, Michigan	B	Granted: 07/29/1986
95	Columbia, South Carolina	A	Granted: 11/14/1986
95	Columbia, South Carolina	B	Granted: 05/07/1986
96	Fort Wayne, Indiana	A	Granted: 11/20/1986
96	Fort Wayne, Indiana	B	Granted: 04/30/1986
97	Bakersfield, California	A	Granted: 09/17/1986
97	Bakersfield, California	B	Granted: 04/30/1986
98	Davenport-Rock Island-Moline, IA/IL	A	Granted: 10/15/1986
98	Davenport-Rock Island-Moline, IA/IL	B	Granted: 08/05/1986
99	York, Pennsylvania	A	Granted: 03/30/1988
99	York, Pennsylvania	B	Granted: 05/16/1986
100	Shreveport, Louisiana	A	Granted: 09/11/1986
100	Shreveport, Louisiana	B	Granted: 01/17/1986
101	Beaumont-Port Arthur, Texas	A	Granted: 10/08/1986
101	Beaumont-Port Arthur, Texas	B	Granted: 04/09/1986
102	Des Moines, Iowa	A	Granted: 12/09/1986
102	Des Moines, Iowa	B	Granted: 06/02/1986
103	Peoria, Illinois	A	Granted: 09/30/1986
103	Peoria, Illinois	B	Granted: 09/30/1986
104	Newport News-Hampton, Virginia	A	Granted: 08/27/1986
104	Newport News-Hampton, Virginia	B	Granted: 01/16/1986
105	Lancaster, Pennsylvania	A	Granted: 09/28/1987
105	Lancaster, Pennsylvania	B	Granted: 05/13/1986
106	Jackson, Mississippi	A	Granted: 03/15/1988
106	Jackson, Mississippi	B	Granted: 05/21/1986
107	Stockton, California	A	Granted: 02/26/1987
107	Stockton, California	B	Granted: 01/09/1986
108	Augusta, Georgia/South Carolina	A	Granted: 09/23/1986
108	Augusta, Georgia/South Carolina	B	Granted: 04/15/1986
109	Spokane, Washington	A	Granted: 12/29/1987
109	Spokane, Washington	B	Granted: 06/18/1986
110	Huntington-Ashland, WV/KY/OH	A	Granted: 09/25/1986
110	Huntington-Ashland, WV/KY/OH	B	Granted: 05/07/1986
111	Vallejo-Fairfield-Napa, California	A	Granted: 02/26/1987
111	Vallejo-Fairfield-Napa, California	B	Granted: 11/14/1985
112	Corpus Christi, Texas	A	Granted: 11/09/1987
112	Corpus Christi, Texas	B	Granted: 06/02/1986
113	Madison, Wisconsin	A	Granted: 02/13/1987
113	Madison, Wisconsin	B	Granted: 07/07/1986
114	Lakeland-Winter Haven, Florida	A	Granted: 11/05/1986
114	Lakeland-Winter Haven, Florida	B	Granted: 02/10/1986
115	Utica-Rome, New York	A	Granted: 11/28/1986

115	Utica-Rome, New York	B	Granted: 09/16/1986
116	Lexington-Fayette, Kentucky	A	Granted: 01/21/1987
116	Lexington-Fayette, Kentucky	B	Granted: 05/12/1986

Mkt Num	Market	Freq. Block	Date of Initial Authorization
117	Colorado Springs, Colorado	A	Granted: 07/16/1987
117	Colorado Springs, Colorado	B	Granted: 10/18/1985
118	Reading, Pennsylvania	A	Granted: 03/31/1988
118	Reading, Pennsylvania	B	Granted: 11/01/1985
119	Evansville, Indiana/Kentucky	A	Granted: 03/03/1987
119	Evansville, Indiana/Kentucky	B	Granted: 06/20/1986
120	Huntsville, Alabama	A	Granted: 04/21/1987
120	Huntsville, Alabama	B	Granted: 05/01/1986
121	Trenton, New Jersey	A	Granted: 02/26/1987
121	Trenton, New Jersey	B	Granted: 09/26/1986
122	Binghamton, New York	A	Granted: 10/24/1986
122	Binghamton, New York	B	Granted: 12/09/1986
123	Santa Rosa-Petaluma, California	A	Granted: 07/16/1987
123	Santa Rosa-Petaluma, California	B	Granted: 10/08/1986
124	Santa Barbara-Santa Maria-Lompoc, CA	A	Granted: 12/19/1986
124	Santa Barbara-Santa Maria-Lompoc, CA	B	Granted: 06/18/1986
125	Appleton-Oskosh-Neenah, Wisconsin	A	Granted: 08/11/1986
125	Appleton-Oskosh-Neenah, Wisconsin	B	Granted: 08/12/1986
126	Salinas-Seaside-Monterey,.California	A	Granted: 03/12/1987
126	Salinas-Seaside-Monterey, California	B	Granted: 04/29/1986
127	Pensacola, Florida	A	Granted: 04/14/1987
127	Pensacola, Florida	B	Granted: 01/15/1987
128	McAllen-Edinburg-Mission, Texas	A	Granted: 09/15/1986
128	McAllen-Edinburg-Mission, Texas	B	Granted: 10/03/1986
129	South Bend-Mishawaka, Indiana	A	Granted: 01/29/1987
129	South Bend-Mishawaka, Indiana	B	Granted: 06/20/1986
130	Erie, Pennsylvania	A	Granted: 07/10/1987
130	Erie, Pennsylvania	B	Granted: 07/10/1986
131	Rockford, Illinois	A	Granted: 03/19/1987
131	Rockford, Illinois	B	Granted: 01/30/1987
132	Kalamazoo, Michigan	A	Granted: 08/26/1986
132	Kalamazoo, Michigan	B	Granted: 02/19/1987
133	Manchester-Nashua, New Hampshire	A	Granted: 10/27/1986
133	Manchester-Nashua, New Hampshire	B	Granted: 09/16/1986
134	Atlantic City, New Jersey	A	Granted: 06/24/1988
134	Atlantic City, New Jersey	B	Granted: 10/08/1986
135	Eugene-Springfield, Oregon	A	Granted: 06/02/1987
135	Eugene-Springfield, Oregon	B	Granted: 11/20/1986
136	Lorain-Elyria, Ohio	A	Granted: 12/18/1986
136	Lorain-Elyria, Ohio	B	Granted: 08/05/1986
137	Melbourne-Titusville-Palm Bay, FL	A	Granted: 12/19/1986
137	Melbourne-Titusville-Palm Bay, FL	B	Granted: 06/23/1986
138	Macon-Warner Robins, Georgia	A	Granted: 08/31/1987
138	Macon-Warner Robins, Georgia	B	Granted: 08/14/1986

139	Montgomery, Alabama	A	Granted: 02/27/1987
139	Montgomery, Alabama	B	Granted: 12/02/1988

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Mkt Num	Market	Freq. Block	Date of Initial Authorization
140	Charleston, West Virginia	A	Granted: 07/16/1987
140	Charleston, West Virginia	B	Granted: 03/25/1987
141	Duluth, MN-WI	A	Granted: 12/23/1986
141	Duluth, MN-WI	B	Granted: 09/18/1986
142	Modesto, California	A	Granted: 08/14/1987
142	Modesto, California	B	Granted: 05/12/1986
143	Johnstown, Pennsylvania	A	Granted: 12/16/1986
143	Johnstown, Pennsylvania	B	Granted: 07/31/1986
144	Orange County, New York	A	Granted: 06/10/1987
144	Orange County, New York	B	Granted: 10/08/1986
145	Hamilton-Middletown, Ohio	A	Granted: 01/15/1987
145	Hamilton-Middletown, Ohio	B	Granted: 07/18/1986
146	Daytona Beach, Florida	A	Granted: 03/26/1987
146	Daytona Beach, Florida	B	Granted: 06/19/1987
147	Ponce, Puerto Rico	A	Granted: 10/24/1986
147	Ponce, Puerto Rico	B	Granted: 05/20/1986
148	Salem, Oregon	A	Granted: 08/05/1987
148	Salem, Oregon	B	Granted: 09/29/1986
149	Fayetteville, North Carolina	A	Granted: 12/23/1986
149	Fayetteville, North Carolina	B	Granted: 05/19/1986
150	Visalia-Tulare-Porterville, CA	A	Granted: 06/05/1987
150	Visalia-Tulare-Porterville, CA	B	Granted: 05/30/1986
151	Poughkeepsie, New York	A	Granted: 10/23/1986
151	Poughkeepsie, New York	B	Granted: 08/05/1986
152	Portland, Maine	A	Granted: 07/09/1987
153	Columbus, Georgia-Alabama	A	Granted: 07/30/1987
153	Columbus, Georgia-Alabama	B	Granted: 07/22/1986
154	New London-Norwich, CT-RI	A	Granted: 07/31/1987
154	New London-Norwich, CT-RI	B	Granted: 08/05/1986
155	Savannah, Georgia	A	Granted: 11/06/1986
155	Savannah, Georgia	B	Granted: 10/16/1986
156	Portsmouth-Dover-Rochester, NH	A	Granted: 09/16/1986
156	Portsmouth-Dover-Rochester, NH	B	Granted: 04/06/1987
157	Roanoke, Virginia	A	Granted: 10/10/1986
157	Roanoke, Virginia	B	Granted: 09/13/1986
158	Lima, Ohio	A	Granted: 09/08/1987
158	Lima, Ohio	B	Granted: 10/16/1986
159	Provo-Orem, Utah	A	Granted: 09/08/1987
159	Provo-Orem, Utah	B	Granted: 08/31/1987
160	Killeen-Temple, Texas	A	Granted: 04/14/1987
160	Killeen-Temple, Texas	B	Granted: 08/07/1986
161	Lubbock, Texas	A	Granted: 03/31/1987
161	Lubbock, Texas	B	Granted: 08/07/1986
162	Brownsville-Harlingen, Texas	A	Granted: 06/24/1986
162	Brownsville-Harlingen, Texas	B	Granted: 08/28/1986

163	Springfield, Missouri	A	Granted: 08/31/1987
163	Springfield, Missouri	B	Granted: 07/16/1987

Mkt Num	Market	Freq. Block	Date of Initial Authorization
164	Fort Myers, Florida	A	Granted: 01/28/1987
164	Fort Myers, Florida	B	Granted: 11/24/1986
165	Fort Smith, Arkansas-Oklahoma	A	Granted: 11/24/1986
165	Fort Smith, Arkansas-Oklahoma	B	Granted: 12/23/1986
166	Hickory, North Carolina	A	Granted: 11/24/1987
166	Hickory, North Carolina	B	Granted: 09/15/1986
167	Sarasota, Florida	A	Granted: 12/09/1986
167	Sarasota, Florida	B	Granted: 08/25/1986
168	Tallahassee, Florida	A	Granted: 12/31/1986
168	Tallahassee, Florida	B	Granted: 08/28/1986
169	Mayaguez, Puerto Rico	A	Granted: 10/14/1986
169	Mayaguez, Puerto Rico	B	Granted: 07/30/1986
170	Galveston-Texas City, Texas	A	Granted: 07/21/1987
170	Galveston-Texas City, Texas	B	Granted: 11/18/1986
171	Reno, Nevada	A	Granted: 03/13/1987
171	Reno, Nevada	B	Granted: 11/24/1986
172	Lincoln, Nebraska	A	Granted: 06/15/1988
172	Lincoln, Nebraska	B	Granted: 07/25/1986
173	Biloxi-Gulfport, Mississippi	A	Granted: 09/01/1988
173	Biloxi-Gulfport, Mississippi	B	Granted: 02/13/1987
174	Lafayette, Louisiana	A	Granted: 11/14/1986
174	Lafayette, Louisiana	B	Granted: 12/10/1986
175	Santa Cruz, California	A	Granted: 03/19/1987
175	Santa Cruz, California	B	Granted: 09/03/1986
176	Springfield, Illinois	A	Granted: 10/19/1987
176	Springfield, Illinois	B	Granted: 02/13/1987
177	Battle Creek, Michigan	A	Granted: 01/15/1987
177	Battle Creek, Michigan	B	Granted: 11/24/1986
178	Wheeling, West Virginia-Ohio	A	Granted: 04/02/1987
178	Wheeling, West Virginia-Ohio	B	Granted: 08/29/1986
179	Topeka, Kansas	A	Granted: 02/26/1987
179	Topeka, Kansas	B	Granted: 09/12/1986
180	Springfield, Ohio	A	Granted: 04/13/1987
180	Springfield, Ohio	B	Granted: 10/03/1986
181	Muskegon, Michigan	A	Granted: 04/14/1987
181	Muskegon, Michigan	B	Granted: 02/13/1987
182	Fayetteville-Springdale, Arkansas	A	Granted: 02/02/1987
182	Fayetteville-Springdale, Arkansas	B	Granted: 03/31/1987
183	Asheville, North Carolina	A	Granted: 06/29/1990
183	Asheville, North Carolina	B	Granted: 12/17/1986
184	Houma-Thibodaux, Louisiana	A	Granted: 08/18/1987
184	Houma-Thibodaux, Louisiana	B	Granted: 11/18/1987
185	Terre Haute, Indiana	A	Granted: 08/13/1987
185	Terre Haute, Indiana	B	Granted: 01/29/1987
186	Green Bay, Wisconsin	A	Granted: 03/12/1987

186	Green Bay, Wisconsin	B	Granted: 04/01/1987
187	Anchorage, Alaska	A	Granted: 03/31/1987
187	Anchorage, Alaska	B	Granted: 02/02/1987

Mkt Num	Market	Freq. Block	Date of Initial Authorization
188	Amarillo, Texas	A	Granted: 05/19/1987
188	Amarillo, Texas	B	Granted: 07/07/1987
189	Racine, Wisconsin	A	Granted: 07/09/1987
189	Racine, Wisconsin	B	Granted: 06/19/1987
190	Boise City, Idaho	A	Granted: 01/08/1988
190	Boise City, Idaho	B	Granted: 03/12/1987
191	Yakima, Washington	A	Granted: 04/17/1987
191	Yakima, Washington	B	Granted: 02/18/1987
192	Gainesville, Florida	A	Granted: 06/19/1987
192	Gainesville, Florida	B	Granted: 08/17/1987
193	Benton Harbor, Michigan	A	Granted: 09/08/1989
193	Benton Harbor, Michigan	B	Granted: 04/01/1987
194	Waco, Texas	A	Granted: 06/24/1987
194	Waco, Texas	B	Granted: 12/23/1986
195	Cedar Rapids, Iowa	A	Granted: 03/12/1987
195	Cedar Rapids, Iowa	B	Granted: 02/18/1987
196	Champaign-Urbana-Rantoul, Illinois	A	Granted: 01/29/1987
196	Champaign-Urbana-Rantoul, Illinois	B	Granted: 12/31/1986
197	Lake Charles, Louisiana	A	Granted: 10/19/1987
197	Lake Charles, Louisiana	B	Granted: 04/13/1987
198	St. Cloud, Minnesota	A	Granted: 09/08/1989
198	St. Cloud, Minnesota	B	Granted: 03/31/1987
199	Steubenville-Weirton, Ohio-West Virginia	A	Granted: 07/06/1990
199	Steubenville-Weirton, Ohio-West Virginia	B	Granted: 09/09/1987
200	Parkersburg-Marietta, Ohio-W. Virginia	A	Granted: 01/25/1988
200	Parkersburg-Marietta, Ohio-W. Virginia	B	Granted: 09/09/1987
201	Waterloo-Cedar Falls, Iowa	A	Granted: 01/08/1988
201	Waterloo-Cedar Falls, Iowa	B	Granted: 03/31/1987
202	Arecibo, Puerto Rico	A	Granted: 06/16/1989
202	Arecibo, Puerto Rico	B	Granted: 11/18/1986
203	Lynchburg, Virginia	A	Granted: 09/12/1989
203	Lynchburg, Virginia	B	Granted: 02/19/1987
204	Aguadilla, Puerto Rico	A	Granted: 07/09/1987
204	Aguadilla, Puerto Rico	B	Granted: 11/21/1986
205	Alexandria, Louisiana	A	Granted: 10/20/1989
205	Alexandria, Louisiana	B	Granted: 03/12/1987
206	Longview-Marshall, Texas	A	Granted: 04/17/1987
206	Longview-Marshall, Texas	B	Granted: 02/02/1987
207	Jackson, Michigan	A	Granted: 02/08/1991
207	Jackson, Michigan	B	Granted: 03/12/1987
208	Fort Pierce, Florida	A	Granted: 04/02/1987
208	Fort Pierce, Florida	B	Granted: 06/15/1987
209	Clarksville-Hopkinsville, TN/KY	A	Granted: 03/11/1987
209	Clarksville-Hopkinsville, TN/KY	B	Granted: 05/20/1987

210	Fort Collins-Loveland, Colorado	A	Granted: 06/15/1987
210	Fort Collins-Loveland, Colorado	B	Granted: 05/01/1987

Mkt Num	Market	Freq. Block	Date of Initial Authorization
211	Bradenton, Florida	A	Granted: 07/10/1987
211	Bradenton, Florida	B	Granted: 05/20/1987
212	Bremerton, Washington	A	Granted: 08/17/1987
212	Bremerton, Washington	B	Granted: 08/17/1987
213	Pittsfield, Massachusetts	A	Granted: 09/08/1987
213	Pittsfield, Massachusetts	B	Granted: 07/30/1987
214	Richland-Kennewick-Pasco, Washington	A	Granted: 02/15/1990
214	Richland-Kennewick-Pasco, Washington	B	Granted: 07/09/1987
215	Chico, California	A	Granted: 09/04/1987
215	Chico, California	B	Granted: 11/18/1986
216	Janesville-Beloit, Wisconsin	A	Granted: 06/25/1987
216	Janesville-Beloit, Wisconsin	B	Granted: 01/15/1987
217	Anderson, Indiana	A	Granted: 07/28/1989
217	Anderson, Indiana	B	Granted: 07/14/1987
218	Wilmington, North Carolina	A	Granted: 10/21/1987
218	Wilmington, North Carolina	B	Granted: 11/20/1987
219	Monroe, Louisiana	A	Granted: 09/11/1989
219	Monroe, Louisiana	B	Granted: 04/13/1987
220	Abilene, Texas	A	Granted: 03/12/1987
220	Abilene, Texas	B	Granted: 04/17/1987
221	Fargo-Moorehead, North Dakota/Minnesota	A	Granted: 11/15/1990
221	Fargo-Moorehead, North Dakota/Minnesota	B	Granted: 04/21/1987
222	Tuscaloosa, Alabama	A	Granted: 10/06/1987
222	Tuscaloosa, Alabama	B	Granted: 06/25/1987
223	Elkhart-Goshen, Indiana	A	Granted: 09/15/1987
223	Elkhart-Goshen, Indiana	B	Granted: 02/17/1987
224	Bangor, Maine	A	Granted: 04/14/1987
224	Bangor, Maine	B	Granted: 09/15/1987
225	Altoona, Pennsylvania	A	Granted: 03/31/1987
225	Altoona, Pennsylvania	B	Granted: 01/29/1987
226	Florence, Alabama	A	Granted: 08/05/1987
226	Florence, Alabama	B	Granted: 07/07/1987
227	Anderson, South Carolina	A	Granted: 07/21/1987
227	Anderson, South Carolina	B	Granted: 12/12/1986
228	Vineland-Millville-Bridgeton, N.J.	A	Granted: 04/29/1987
228	Vineland-Millville-Bridgeton, N.J.	B	Granted: 02/05/1987
229	Medford, Oregon	A	Granted: 07/07/1987
229	Medford, Oregon	B	Granted: 07/23/1987
230	Decatur, Illinois	A	Granted: 10/01/1987
230	Decatur, Illinois	B	Granted: 06/15/1988
231	Mansfield, Ohio	A	Granted: 04/14/1987
231	Mansfield, Ohio	B	Granted: 04/01/1987
232	Eau Claire, Wisconsin	A	Granted: 10/25/1989
232	Eau Claire, Wisconsin	B	Granted: 08/05/1987
233	Wichita Falls, Texas	A	Granted: 07/07/1987

233	Wichita Falls, Texas	B	Granted: 05/20/1987
234	Athens, Georgia	A	Granted: 06/12/1987
234	Athens, Georgia	B	Granted: 03/11/1987

Mkt Num	Market	Freq. Block	Date of Initial Authorization
235	Petersburg-Colonial Heights-Hopewell, VA	A	Granted: 10/29/1987
235	Petersburg-Colonial Heights-Hopewell, VA	B	Granted: 01/29/1987
236	Muncie, Indiana	A	Granted: 07/23/1987
236	Muncie, Indiana	B	Granted: 04/13/1987
237	Tyler, Texas	A	Granted: 06/19/1987
237	Tyler, Texas	B	Granted: 04/13/1987
238	Sharon, Pennsylvania	A	Granted: 04/13/1987
238	Sharon, Pennsylvania	B	Granted: 02/02/1987
239	Joplin, Missouri	A	Granted: 06/25/1987
239	Joplin, Missouri	B	Granted: 03/11/1987
240	Texarkana, Texas - Texarkana, Arkansas	A	Granted: 03/31/1987
240	Texarkana, Texas - Texarkana, Arkansas	B	Granted: 04/17/1987
241	Pueblo, Colorado	A	Granted: 10/29/1987
241	Pueblo, Colorado	B	Granted: 03/11/1987
242	Olympia, Washington	A	Granted: 06/19/1987
242	Olympia, Washington	B	Granted: 06/19/1987
243	Greeley, Colorado	A	Granted: 05/19/1987
243	Greeley, Colorado	B	Granted: 03/11/1987
244	Kenosha, Wisconsin	A	Granted: 06/25/1987
244	Kenosha, Wisconsin	B	Granted: 09/09/1987
245	Ocala, Florida	A	Granted: 11/09/1987
245	Ocala, Florida	B	Granted: 02/13/1987
246	Dothan, Alabama	A	Granted: 09/08/1987
246	Dothan, Alabama	B	Granted: 03/11/1987
247	Lafayette, Indiana	A	Granted: 04/14/1987
247	Lafayette, Indiana	B	Granted: 06/19/1987
248	Burlington, Vermont	A	Granted: 04/28/1989
248	Burlington, Vermont	B	Granted: 08/14/1987
249	Anniston, Alabama	A	Granted: 07/30/1987
249	Anniston, Alabama	B	Granted: 05/20/1987
250	Bloomington-Normal, Illinois	A	Granted: 03/03/1989
250	Bloomington-Normal, Illinois	B	Granted: 06/15/1988
251	Williamsport, Pennsylvania	A	Granted: 01/25/1990
251	Williamsport, Pennsylvania	B	Granted: 05/04/1987
252	Pascagoula, Mississippi	A	Granted: 06/05/1989
252	Pascagoula, Mississippi	B	Granted: 04/13/1987
253	Sioux City, Iowa-Nebraska	A	Granted: 05/19/1987
253	Sioux City, Iowa-Nebraska	B	Granted: 08/05/1987
254	Redding, California	A	Granted: 03/31/1987
254	Redding, California	B	Granted: 12/28/1987
255	Odessa, Texas	A	Granted: 04/14/1987
255	Odessa, Texas	B	Granted: 06/15/1987
256	Charlottesville, Virginia	A	Granted: 06/16/1989
256	Charlottesville, Virginia	B	Granted: 02/02/1987

257	Hagerstown, Maryland	A	Granted: 07/01/1988
257	Hagerstown, Maryland	B	Granted: 11/09/1988

Mkt Num	Market	Freq. Block	Date of Initial Authorization
258	Jacksonville, North Carolina	A	Granted: 10/20/1987
258	Jacksonville, North Carolina	B	Granted: 01/29/1987
259	State College, Pennsylvania	A	Granted: 09/08/1987
259	State College, Pennsylvania	B	Granted: 04/01/1987
260	Lawton, Oklahoma	A	Granted: 10/20/1987
260	Lawton, Oklahoma	B	Granted: 08/17/1987
261	Albany, Georgia	A	Granted: 04/21/1987
261	Albany, Georgia	B	Granted: 05/04/1987
262	Danville, Virginia	A	Granted: 09/04/1987
262	Danville, Virginia	B	Granted: 07/23/1987
263	Wausau, Wisconsin	A	Granted: 10/05/1987
263	Wausau, Wisconsin	B	Granted: 07/07/1987
264	Florence, South Carolina	A	Granted: 07/10/1987
264	Florence, South Carolina	B	Granted: 06/15/1987
265	Fort Walton Beach, Florida	A	Granted: 07/07/1987
265	Fort Walton Beach, Florida	B	Granted: 03/31/1987
266	Glens Falls, New York	A	Granted: 06/25/1987
266	Glens Falls, New York	B	Granted: 08/17/1987
267	Sioux Falls, South Dakota	A	Granted: 06/15/1987
267	Sioux Falls, South Dakota	B	Granted: 02/05/1987
268	Billings, Montana	A	Granted: 08/17/1987
268	Billings, Montana	B	Granted: 07/09/1987
269	Cumberland, Maryland-West Virginia	A	Granted: 05/19/1987
269	Cumberland, Maryland-West Virginia	B	Granted: 11/02/1988
270	Bellingham, Washington	A	Granted: 05/19/1987
270	Bellingham, Washington	B	Granted: 04/01/1987
271	Kokomo, Indiana	A	Granted: 04/28/1989
271	Kokomo, Indiana	B	Granted: 09/09/1987
272	Gadsden, Alabama	A	Granted: 06/15/1987
272	Gadsden, Alabama	B	Granted: 07/23/1987
273	Kankakee, Illinois	A	Granted: 08/05/1987
273	Kankakee, Illinois	B	Granted: 04/13/1987
274	Yuba City, California	A	Granted: 07/07/1987
274	Yuba City, California	B	Granted: 03/11/1987
275	St. Joseph, Missouri	A	Granted: 01/21/1988
275	St. Joseph, Missouri	B	Granted: 02/05/1987
276	Grand Forks, North Dakota	A	Granted: 05/19/1987
276	Grand Forks, North Dakota	B	Granted: 06/15/1987
277	Sheboygan, Wisconsin	A	Granted: 06/05/1989
277	Sheboygan, Wisconsin	B	Granted: 06/15/1987
278	Columbia, Missouri	A	Granted: 08/17/1989
278	Columbia, Missouri	B	Granted: 02/17/1987
279	Lewiston-Auburn, Maine	A	Granted: 05/04/1987
279	Lewiston-Auburn, Maine	B	Granted: 09/11/1987
280	Burlington, North Carolina	A	Granted: 10/25/1989

280	Burlington, North Carolina	B	Granted: 07/09/1987
281	Laredo, Texas	A	Granted: 06/25/1987
281	Laredo, Texas	B	Granted: 04/01/1987

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Mkt Num	Market	Freq. Block	Date of Initial Authorization
282	Bloomington, Indiana	A	Granted: 07/23/1987
282	Bloomington, Indiana	B	Granted: 07/14/1987
283	Panama City, Florida	A	Granted: 07/23/1987
283	Panama City, Florida	B	Granted: 03/11/1987
284	Elmira, New York	A	Granted: 09/04/1987
284	Elmira, New York	B	Granted: 04/17/1987
285	Las Cruces, New Mexico	A	Granted: 06/15/1987
285	Las Cruces, New Mexico	B	Granted: 05/20/1987
286	Dubuque, Iowa	A	Granted: 07/09/1987
286	Dubuque, Iowa	B	Granted: 06/19/1987
287	Bryan-College Station, Texas	A	Granted: 05/04/1987
287	Bryan-College Station, Texas	B	Granted: 04/01/1987
288	Rochester, Minnesota	A	Granted: 07/30/1987
288	Rochester, Minnesota	B	Granted: 07/23/1987
289	Rapid City, South Dakota	A	Granted: 07/07/1987
289	Rapid City, South Dakota	B	Granted: 07/08/1987
290	La Crosse, Wisconsin	A	Granted: 07/30/1987
290	La Crosse, Wisconsin	B	Granted: 09/09/1987
291	Pine Bluff, Arkansas	A	Granted: 10/06/1987
291	Pine Bluff, Arkansas	B	Granted: 08/05/1988
292	Sherman-Denison, Texas	A	Granted: 06/15/1987
292	Sherman-Denison, Texas	B	Granted: 03/11/1987
293	Owensboro, Kentucky	A	Granted: 08/17/1987
293	Owensboro, Kentucky	B	Granted: 09/09/1987
294	San Angelo, Texas	A	Granted: 05/19/1987
294	San Angelo, Texas	B	Granted: 04/01/1987
295	Midland, Texas	A	Granted: 09/11/1989
295	Midland, Texas	B	Granted: 08/05/1987
296	Iowa City, Iowa	A	Granted: 06/19/1987
296	Iowa City, Iowa	B	Granted: 06/15/1987
297	Great Falls, Montana	A	Granted: 07/09/1987
297	Great Falls, Montana	B	Granted: 04/21/1987
298	Bismarck, North Dakota	A	Granted: 06/19/1987
298	Bismarck, North Dakota	B	Granted: 06/25/1987
299	Casper, Wyoming	A	Granted: 10/13/1988
299	Casper, Wyoming	B	Granted: 04/17/1987
300	Victoria, Texas	A	Granted: 09/21/1987
300	Victoria, Texas	B	Granted: 04/01/1987
301	Lawrence, Kansas	A	Granted: 09/15/1987
301	Lawrence, Kansas	B	Granted: 04/13/1987
302	Enid, Oklahoma	A	Granted: 05/22/1990
302	Enid, Oklahoma	B	Granted: 05/20/1987
303	Aurora-Elgin, Illinois	A	Granted: 11/03/1987
303	Aurora-Elgin, Illinois	B	Granted: 04/01/1987

304	Joliet, Illinois	A	Granted: 07/09/1987
304	Joliet, Illinois	B	Granted: 06/19/1987

Mkt Num	Market	Freq. Block	Date of Initial Authorization
305	Alton-Granite City, Illinois	A	Granted: 06/25/1987
305	Alton-Granite City, Illinois	B	Granted: 05/04/1987
306	Gulf of Mexico	A	Granted: 08/14/1985
306	Gulf of Mexico	B	Granted: 08/14/1985

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91-303
38244

In the Matter of	)	
	)	
Review of the Technical	)	MM Docket No. 87-267
Assignment Criteria for the	)	
AM Broadcast Service	)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1991 Released: October 25, 1991

By the Commission: Commissioner Quello concurring in part and issuing a separate statement; Commissioners Barrett and Duggan concurring and issuing separate statements.

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I. Introduction

1. This Report and Order concludes an important phase of this Commission's overall program for the transformation and revitalization of the AM broadcast service by the year 2000. AM radio was this country's first national medium of mass communications and, for more than a half century, its contribution to daily life in America was unquestioned. The AM

service was a unifying force throughout the country, providing a wealth of news, information, entertainment, education, and political dialogue readily accessible to virtually all Americans. In the process, it literally revolutionized the fabric of our daily lives, our dialogue and our democracy.

2. Over the years, however, channel congestion and interference, both radio- and environmentally-induced, have dramatically increased in the AM band. Coincident with this growth has been a decline in the fidelity of AM receivers. As a consequence, during the last twenty years there has been a well-documented shift of AM listeners to newer mass media services that offer higher technical quality and better aural fidelity. This shift in listenership has clearly dulled the competitive edge of this once vital service.

3. Nonetheless, we believe that AM radio continues to hold a valuable place on the communications landscape. AM service provides a significant number of outlets that contribute to the vital diversity of viewpoints and programming available to Americans.[1] Indeed, AM often offers the only radio service to listeners in a variety of circumstances, particularly those living in and traveling through rural areas. In view of the undisputed public importance of the AM service, we believe that innovative and substantial regulatory steps must be taken to ensure its health and survival.

4. For the past several years, the Commission has made an intensive effort to identify the service's most pressing problems and, where relevant and feasible, to adapt the regulatory environment for AM stations that will ameliorate those problems. Following the Mass Media Bureau's 1986 Report on the Status of the AM Broadcast Rules, and the subsequent Notice of Inquiry (Inquiry), 2 FCC Rcd 5014 (1987), we took several actions. These included improving our prediction of groundwave and nighttime skywave service and interference;[2] accepting interference-reducing modifications without competing applications;[3] eliminating grandfathered deleted AM station assignments;[4] and adopting a new emissions standard for adjacent channel interference to improve aural fidelity.[5] In conjunction with these individual actions, we issued last year a Notice of Proposed Rule Making (Notice), 5 FCC Rcd 4381

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[1]As of June 30, 1991, AM stations accounted for nearly half of the 10,924 licensed radio stations in the country.

[2]Report and Order in MM Docket No. 88-510, 5 FCC Rcd 4489 (1990); Report and Order in MM Docket No. 88-508, 5 FCC Rcd 4482 (1990).

[3]Report and Order in MM Docket No. 89-46, 5 FCC Rcd 4492 (1990).

[4]Id.

[5]Report and Order in MM Docket No. 88-376, 4 FCC Rcd 3835 (1989); recon. denied, 5 FCC Rcd 2598 (1990); Memorandum Opinion and Order in MM Docket No. 88-376 5 FCC Rcd 5191 (1990).

(1990), to initiate a comprehensive revision of the remaining AM technical and legal standards, rules and policies. Our goal was to facilitate an overall improvement and revitalization of the AM broadcast service, and to effectuate the necessary incorporation of new AM spectrum between 1605 and 1705 kHz into the existing AM band (535 to 1605 kHz).[6]

II. Summary

5. This Report and Order describes the actions resulting from our comprehensive review of the many regulatory areas which affect the AM service. As detailed below, our review has led us to adopt numerous revisions and adjustments, both major and minor, to the existing rules and policies governing the AM band. We intend and expect that these modifications will enhance the technical characteristics of AM broadcasting and thus provide the potential for improving AM service in the near future as well as in the long term.

6. The goal of this proceeding has been to refine and integrate various proposals into a comprehensive plan that will eventually achieve a significantly improved AM service. In response to the Inquiry, the commenters repeatedly emphasized the need to improve the technical quality of the AM service. The strategy initiated in the Notice and adopted in substantial part here consists of three essential and mutually supporting elements designed to serve that objective by reducing congestion and interference in the AM band. The first element ("Technical Standards") implements new and revised AM technical standards that should reduce over time the interference with which AM broadcasters must contend in their primary service areas. The next action ("Migration") selectively opens the ten newly available frequencies in the expanded band (1605-1705 kHz) to those existing AM stations which significantly contribute to congestion and interference in the existing band. Our action here initially restricting eligibility for expanded band authorizations to existing AM licensees is intended to redress the unique technical problems present in the AM service. It should be not be taken to suggest any generalized Commission policy favoring existing licensees over new entrants in other services where new or expanded opportunities may arise. The Commission remains fully committed to our diversity goals of providing opportunities for diverse voices in local communities. The third initiative ("Consolidation") affords broadcasters greater latitude and incentive to reduce interference through non-technical means.

7. To provide a specific structure for these revitalization efforts, we defined two models of AM station operation in the Notice, one for operation in the expanded band and one for operation in the existing band. (Notice at 4382.) Model I parameters, for expanded band stations, are intended to take advantage of the fact that there are currently no stations in the expanded band, and therefore define idealized facilities. Model I parameters include

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[6]In response to the Notice, more than 150 comments and reply comments were filed. The parties are listed in Appendix A.

fulltime operation with stereo, technical quality competitive with FM, 10 kW daytime power, 1 kW nighttime power, non-directional (or simple directional) antenna, and a 400-800 km spacing between co-channel stations. Model II parameters, for stations in the existing band, reflect the realities in that band -- particularly dense station population coupled with wide variations in spacing, power, antenna patterns, and interference protection -- and represent those attributes toward which the service can reasonably aspire. They include fulltime operation, competitive technical quality, and wide area daytime coverage with nighttime coverage at least 15% of daytime coverage.

8. **Technical Standards.** To facilitate movement in the direction of these models, we first take a number of actions which will improve the quality of service in the existing AM band. Many of these actions are made realizable, in part, by the opportunity for reduced interference and congestion that will result from mutual agreements among existing licensees and from the migration of stations to the expanded band. Most notably, we: (1) increase the first and second adjacent channel protection ratios to reduce adjacent channel interference and to promote the development of receivers with higher audio fidelity; (2) refine the methodology of calculating nighttime coverage and interference to more accurately measure interference effects, which should lead to an improvement in nighttime reception; and (3) in some cases, require a 10% interference reduction when modifications are made to AM station facilities, which should gradually reduce the overall presence of interference.

9. **Migration.** We next adopt a set of rules for the expanded band intended to reduce interference in the existing band, while facilitating the prompt initiation of high quality service in the new broadcasting spectrum. In this way, we intend to manage the migration process to maximize the benefits to the AM service as a whole. To achieve this objective, we adopt measures designed to encourage those stations whose migration would achieve the greatest interference reductions in the existing band to do so. We stand committed to our goal of creating a model AM service in the expanded band that will ensure that the full potential of AM broadcasting can be realized. To this end, we: (1) adopt an allotment plan for the AM expanded band that is based on wide station separations and low interference levels, in order to facilitate the universal establishment of Model I service in the expanded band; (2) rank competing migration proposals using factors related to the interference reduction and service provided; (3) specify minimum transmitting antenna efficiency to maximize the utilization of each allotment in the expanded band; (4) offer an eligibility preference to AM stereo broadcasting in the expanded band to ensure that the competitive benefits offered by the expanded band are more fully realized; and (5) allow dual ownership and operation of existing and expanded band stations for a transitional period of five years, with a corresponding waiver of duopoly and national ownership rules during the permissible period of dual operation.

10. **Consolidation.** We also take several actions in non-technical areas that should lead to a reduction in overall interference in the band and a reshaping of existing AM service. Specifically, we: (1) permit the issuance of tax certificates in conjunction with voluntary arrangements to reduce interference by discontinuing the operation of marginal stations; and

(2) relax our multiple ownership rules for those proposing changes in facilities that would result in a significant reduction of interference in the existing AM band. For the reasons stated in paragraph 182 below, we will not change the AM-FM programming duplication provisions at this time.

11. As to related matters, we also (1) relax the rules pertaining to Travelers Information Stations to allow for the authorization (on a secondary basis) of such stations on any assignable frequency in the AM band; and (2) discuss voluntary receiver standards.

12. Certain other rule changes described in the Notice were adopted in other proceedings with effective dates that were deferred pending the release of this Report and Order. (See para. 4, supra, and Notice at paras. 18-25.) As discussed in paragraph 218, our action today establishes an effective date for those rule changes. Finally, as discussed in paragraph 216, the "AM Freeze" that has been in effect since last year, pending today's action, is lifted as of the effective date of this Report and Order.

13. A principal point made in the Notice bears reiteration here. In reaching the decisions we announce today, our focus has been on those measures that will, in our judgment, attain the objective of AM service restoration rather than on measures that might more directly benefit one or more individual segments of the industry itself. The major issue in this rule making proceeding has been the revitalization, indeed the survival, of the AM broadcast service. Therefore, those whose interests have not been fully realized by these actions should note that we have attempted to balance their individual perspectives and needs with the ultimate goal of promoting the revitalization of the AM broadcast service as a whole. This is the principle by which we have been guided in assessing particular proposals. In the Notice we made it clear that proposals that do not comply with the AM improvement efforts being developed will generally be rejected in recognition of the fact that the overall public interest attendant to the revitalization of the AM band outweighs any particular broadcaster's individual perceived needs or desires.

III. Technical Standards

14. The first part of the overall AM Improvement scheme is to evaluate current technical standards and to identify and revise those related regulatory standards and procedures that have led to increased interference and reduced service in the AM band. As stated in the Notice, the Commission has already taken numerous steps, including the development of improved skywave and groundwave propagation models as well as the deletion from our records of unused facilities.[7] We today modify those regulations that, by permitting a decline in the quality of existing service, no longer serve to protect the public interest. While we separately address these technical items for the purposes of discussion, we remain acutely aware of their interrelationships and their potential impact on the AM service

[7]See Notice at paragraphs 19 through 22.

if considered individually.

A. Reclassification/Power Increases.

15. **Background/Proposal.** The current U.S. system for classification of AM broadcast stations was developed many years ago and paralleled the systems contained in earlier international agreements to which the United States was a signatory. Under this system, the AM broadcast service developed on the basis that frequencies and stations were each classified according to perceived usage - e.g., stations designed to provide wide-area service were assigned to channels designated for that use. The FCC rules classified channels as Clear, Regional or Local channels, and prescribed the classes of stations that were assigned on each type of channel.[8] As part of a general station assignment philosophy, discrete power levels were associated with specific classes of stations. Accordingly, the AM frequency band was divided into three classes of channels on which four classes of stations operated. U.S. stations were classed either as Class I, II, III or IV, with certain sub-classifications.[9] The maximum power depended on the class of station as follows:

Class of station	Maximum power permitted
I, II	50 kW
III	5 kW
IV	1 kW

16. Until recent years, this system of station assignments had not suffered from any apparent major drawbacks. This was true primarily for two reasons. First, the majority of AM stations in the Western Hemisphere were U.S. stations and were therefore assigned on a common basis. Except for Canada and Mexico, the number of stations in other countries was sufficiently small as to have minimal impact upon the U.S. Second, the countries which posed the greatest potential impact on the U.S. (i.e. Canada, Mexico and Cuba) were, along with the United States, parties to international agreements that generally reflected technical criteria consistent with our domestic rules.

17. Within the past ten years, the U.S. has become a party to the following new multilateral and bilateral international agreements that directly relate to existing AM band operations: the 1981 Rio Agreement, the 1984 U.S./Canada Agreement and the 1986 U.S./Mexico Agreement. Each of these agreements contain AM station classifications that differ from those currently specified in the FCC Rules. All of these agreements prescribe

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[8]For a description of the various classes of channels and stations, see Appendix E, Section 73.21, which, except for station classes, is essentially the same as the current rules.

[9]For example, Class II stations were sub-classified as Class II-A, II-B, II-C or II-D stations and differed generally only in their levels of protection, hours of operation and nighttime power ceilings.

three classes of AM stations: Class A, Class B, and Class C.

18. The Notice proposed to change the current system of AM station classification to conform to the international agreements to which the U.S. is a party. Class I stations would become Class A stations; Class II and III stations would become Class B; and Class IV stations would become Class C. We also proposed the establishment of a fourth class of station, Class D, which would include stations that do not have fully protected unlimited-time operation.[10]

19. In the Notice, we observed that most stations could be reclassified easily, but recognized that certain adjustments in nighttime protection levels for some sub-classes would be necessary.[11] For example, sub-classes II-A, II-B, II-C and III would, if changed to Class B, require changes to current nighttime protection levels. In the Notice, we proposed to adopt a nighttime protection level of 2.0 mV/m for all Class II-A, II-B, II-C and III stations, noting that this would constitute an obvious improvement in protection for all but the Class II-A stations.[12] We recognized that this would apparently affect Class II-A stations which are presently protected to the 0.5 mV/m contour. Observing, however, that only one of 12 existing Class II-A stations had service limited to less than 2.0 mV/m (1.8 mV/m), we tentatively concluded that this adverse effect was minimal.

20. Finally, in order to be further consistent with international agreements, the Notice also proposed to increase the maximum power of Class B stations to 50 kW. We noted that this change would allow stations, currently limited to a power no greater than 5 kW, an opportunity to increase coverage provided that all other technical criteria are met.

21. **Comments.** Commenters overwhelmingly supported the Notice for its attempt to bring the domestic FCC regulations into line with the international agreements. Of the few comments received regarding the revision of protected contours, some opposition was expressed to the small amount of potential additional interference that would be associated with a reclassification of the one Class II-A station and the corresponding reduction of its protected service area. The possibility of increased power for many Class III stations received broad support. Some commenters, however, expressed the need to maintain adequate interference protection should the power ceiling be raised.

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[10]This would consist of daytime-only stations, including those that operate with extended hours authorizations, namely Class II-D, Class II-S, Class III-D and Class III-S stations. Creation of this separate class would help to focus attention on a category of stations which has its own set of special needs. These stations would be notified internationally as Class B.

[11]Stations are protected at night to the values specified in Section 73.182 or to higher values resulting from interference imposed by authorized facilities of other stations. In practice, most stations are protected to values which are higher than the specified nominal values.

[12]Stations presently limited to more than 2.0 mV/m would be protected at the higher level.

22. **Discussion.** In reaching a decision on this issue, we address three elements that are related to the reclassification process. They are: administrative convenience, changes to protection criteria, and changes in power level restrictions.

23. First, with respect to administrative convenience, the process by which the FCC administers the AM service requires considerable coordination with other countries, compliance with several treaties and participation in a complex notification process with international bodies. Confusion would be avoided and administrative burdens on the FCC and the industry would be greatly eased by adoption of a single classification and nomenclature system. For those reasons, we are adopting the classification revisions as proposed in the Notice.[13]

24. Second, with regard to changes to protection criteria, only one station (out of nearly 5,000) has been identified as being adversely impacted. That station, a Class II-A, is currently protected to a value slightly less than we proposed. While it is disconcerting to adopt rules that would permit an increase in interference to this or any other station, we find that no new information has been provided that would persuade us to alter our initial conclusion. We continue to believe that the practical impact of the potential for minor increased interference to a single station is not of an overriding nature, especially when balanced against the overall benefits of reclassification for the entire AM service such as consistency with other countries, and simplified administrative procedures. Furthermore, we note that the overall improved protection criteria adopted herein could act to offset this apparent effect. Accordingly, we are adopting revised nighttime protection levels as proposed.[14]

25. Third, as to the power level question, we note strong support for an increase in the maximum permissible power level for Class B stations. This would allow stations to

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[13]Stations migrating to the expanded band will be categorized as nominal Class B facilities. Use of the term "nominal Class B" facility is intended to distinguish expanded band stations, awarded by allotment plan procedures, from existing band Class B facilities, governed by assignment procedures. Service contour protection requirements given in Section 73.182 of the Rules will not apply initially among nominal Class B facilities in the expanded band since the station spacings prescribed in the allotment plan will form the basis for interference protection rights unless otherwise specified. Because of the adjacent channel relationships, service contour protection requirements will apply from the effective date of this order between stations in the expanded band on channels 1610, 1620 and 1630 kHz and stations in the existing band on 1600, 1590 and 1580 kHz. Additionally, nominal Class B stations in the expanded band are limited by international agreement to a maximum power of 10 kW, as opposed to the 50 kW limit for existing band Class B stations.

[14]See paragraph 38, infra, for the reasoning behind the selection of a 2 mV/m protected contour.

operate with power in excess of 5 kW (up to 50 kW), provided that all other technical criteria are met.[15] In practical terms, this would permit stations increased flexibility in tailoring station power and other characteristics to specific needs. The concerns of some commenters regarding additional interference that might result from this action are misplaced since any proposal for an increase in power would have to comply with all applicable interference provisions of the rules, as revised in this proceeding. Accordingly, our rules are revised to increase the maximum power for Class B stations, conforming our domestic rules to the international agreements to which the United States is a party and bringing U.S. stations into parity with those of other countries.[16]

B. Normally Protected Contours.

26. **Background/Proposal.** A station's normally protected contour, one of several fundamental elements of the AM station assignment criteria, defines the area within which it is desirable to promote quality service and minimize interference, insofar as possible. Technical factors governing the selection of the field strength values assigned to such contours include the minimum usable field strength and noise, both atmospheric and man-made. These contours serve as a basis for the Commission's determination of an application's acceptability. They are also important to individual stations because of their direct relationship to market value and sales price.

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[15]Class III stations must meet certain treaty obligations. The North American Regional Broadcasting Agreement (NARBA), in effect since 1959, has generally been superseded by the Rio 81 Regional Agreement, but still restricts Class III stations to a maximum power of 5 kW insofar as these stations may impact the Dominican Republic and the Bahamas Islands. The rules that we are adopting permit Class III stations to use power higher than 5 kW, while limiting radiation to not more than 5 kW toward those countries. (See Section 73.21(b)(2) of the Rules.) These provisions will continue until we are able to reach appropriate international agreements that result in the termination of NARBA with respect to the Bahamas Islands and the Dominican Republic.

[16]It is also important to note that our current power limitations may, in some cases, handicap U.S. broadcasters in dealing with international problems. For example, a U.S. Class III station is limited to 5 kW under FCC rules although classified as a "Class B" station under the Region 2 Agreement (Rio de Janeiro, 1981) which permits operation with up to 50 kW. This can result in a significant loss of service when a U.S. station operating at 5 kW receives extensive interference from a foreign station and the problem cannot be resolved through negotiations nor will the current rules permit the affected station to regain lost service through a permanent power increase above the 5 kW limit. For this reason, we also believe it beneficial to increase the power limitation of Class B stations to the higher international limit. In MM Docket No. 84-752, the FCC increased the maximum power ceiling to 50 kW for Class III stations in Alaska, Hawaii, Puerto Rico and the Virgin Islands primarily for this reason.

27. The current rules stipulate daytime groundwave protection to the 0.5 mV/m contour for all classes of stations except for Class I stations, which are protected during both the daytime and critical hours to the 0.1 mV/m contour.[17] At night, Class I stations are protected to the 0.5 mV/m-50% skywave contour as well as the 0.5 mV/m groundwave contour.[18] The other classes are protected at night as follows: Class II-A, 0.5 mV/m groundwave; Class II-B, 2.5 mV/m groundwave; Class II-C, 10.0 mV/m groundwave; and Class III, 2.5 mV/m groundwave, except where stations are limited by interference to higher values which then become the reference for protection purposes. (See footnote 11, supra). Class IV stations are not protected at night.

28. Noting the significant changes in the radio broadcasting environment during the past twenty years, and recognizing that the protected contours currently specified in our rules were developed during an earlier period consistent with policies based upon service needs of the public perceived at that time, the Inquiry asked whether, weighing the habits of today's listening public, the field strength values of these protected contours should be redefined. The overwhelming majority of commenters agreed that the contours should not be changed. Thus, in the Notice we tentatively concluded that changing these contours would not significantly improve AM service and proposed to leave them unchanged, with one exception.

29. The one minor exception to this conclusion was related to our proposal to reclassify stations and adjust nighttime protection levels accordingly. The Notice proposed to modify the baseline nighttime protection contour for Class II-A, II-B, II-C and Class III full time stations to uniformly protect the 2.0 mV/m contour.[19] This change would bring a measure of consistency to the new Class B category and would have a minimal impact on assignments, for, although we refer to this 2.0 mV/m contour as being "normally protected", stations rarely provide actual service to this contour.[20] In fact, as an inherent feature of the licensing process, most stations authorized in the past 40 years have accepted substantially greater levels of interference than that defined by the 2.0 mV/m standard. In a related matter, the Notice also proposed elimination of Section 73.37(b), which effectively is an exception to the protected contour criteria and which allows interference within the daytime 0.5 mV/m normally protected contour (up to the 1 mV/m contour) of a station that is or will be the first

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[17]The term critical hours refers to the two hours after local sunrise and the two hours before local sunset. See Section 73.187.

[18]Class I stations in Alaska are protected to the 0.1 mV/m-50% skywave contour at night.

[19]These former classes comprise the new Class B category. See paragraphs 15 to 25, supra, regarding station reclassification.

[20]See Notice at para. 44.

licensed AM station in a community.[21] No other changes to protected contours were proposed.

30. **Comments.** A number of commenters concluded that no change is needed, while a larger number suggested protection to higher values of field strength, particularly for daytime protected contours. Cohen, Dippell and Everist, P.C. (CDE) argued that higher power levels would provide better service and that the daytime normally protected contour should be changed from 0.5 mV/m to 2.0 mV/m. Others who supported the use of a higher contour level for daytime protection cited the lack of quality service in non-rural areas to the 0.5 mV/m contour. The value mentioned by virtually all these commenters as the viable protected contour was 2.0 mV/m. In their reply comments, Lahm, Suffa & Cavell, Inc. (LSC) suggested that the greater protection afforded Class I stations during daytime hours be eliminated and that they be protected at the same levels proposed for Class II and III stations.

31. Most comments favored elimination of Section 73.37(b) of the Rules or its restriction to special situations. In this regard, the National Association of Broadcasters (NAB) argued that Section 73.37(b) "fosters" and "encourages" tolerance of interference in the AM band, and this encourages the "abandonment" of AM. On the other hand, we have received comments favoring retention of the rule. The gravamen of those comments is that the rule does not cause interference and is "pro service" and as such, we should not deny an applicant the opportunity to provide or enhance a community's only local service.

32. **Discussion.** The selection of an appropriate value for the normally protected contours is central to our assignment principles. Due to the variety of physical factors governing AM signal propagation, each station faces its own unique operating situation. While it is true that the definition of normally protected contours depends heavily on several purely technical considerations (e.g., E_{min} and noise)[22] , a major element involves policy decisions that reflect goals for the AM service. In simple terms, the technical standards that directly relate to service goals are the normally protected contour, known as E_{nom}, and protection ratios. To establish wide area service and low levels of interference, E_{nom} should be low and the protection ratio should be high. In a new service there is much latitude for determining appropriate values of the technical criteria. In a mature service, such as AM broadcasting, however, virtually any change to the technical criteria impacts existing stations in some manner. Decisions we reach must necessarily take account of this fact.

33. There are four matters to resolve at this stage. They are: (1) our tentative decision to make no changes in normally protected contours daytime; (2) our tentative decision to make no changes in normally protected contours at night, except in the case of

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[21]This issue was originally raised in MM Docket No. 88-376, but was subsumed in this proceeding by the Notice.

[22]These are discussed in Section III.C., "E_{min} and Noise", paragraphs 40 to 47.

reclassification; (3) our proposal to eliminate the exception for the first AM facility in a community; and (4) the commenters' suggestion that power increases and changes to normally protected contours are the solution to the problem.

34. The proposals we made in the Notice were the result of our careful consideration of the comments in response to the Inquiry. While those comments strongly supported no change in the normally protected contours, we note that the responses to the Notice indicate a significant reversal of position.[23] That is, the commenters now want the FCC to adopt new normally protected contours that would reduce the level of protection to stations. To put this suggestion in perspective, we note that the specification of a 2 mV/m normally protected contour instead of a 0.5 mV/m contour is equivalent to a 12 dB reduction in the level of protection. The only apparent benefit realized from this reduced protection would be the added flexibility afforded stations that are currently prevented from increasing power because of the current protection criteria. It follows that other stations that had no interest in increasing power or could not do so would be subject to receiving additional interference and a loss of service area. Such a result is contrary to our goal of reducing interference in the AM service.

35. Our efforts, clearly enunciated in the Notice, are directed to an AM service that will over a period of years become increasingly free of interference and ultimately be a competitive force in the broadcast market. In reaching that goal, we see no benefit in reducing the level of protection solely because of existing interference that has been allowed to develop because of past Commission actions. Rather, we are compelled to reverse the trend of increasing interference and rely on meaningful technical principles that, if properly implemented, will lead to improved AM service.

36. The argument that many commenters make regarding the lack of service to the normally protected contour actually is strong support for our proposals to increase the levels of protection rather than to decrease them. For example, the current AM broadcast service developed on the basis of well-defined protection levels and has resulted in diminishing service over the years. Even if we were to reduce the protection levels to those suggested by the commenters, there is no guarantee that existing levels of service would remain as they are. On the contrary, our understanding of sound engineering principles makes us well aware that over time the cumulative effect of adding new stations and permitting power increases or other modifications of existing stations would result in further diminishment of the AM broadcast service.

37. Several commenters have suggested across-the-board power increases as a way of assuring reception within prescribed service contours. These comments appear to make an assumption that the increases in power can be equitably distributed across the AM spectrum

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[23]Most of the responses, however, were of a general nature and contained little, if any, supporting information of a scientific nature.

so that the gains and losses would offset each other and that the benefits would be apportioned in a fair manner. This would not be the case. AM stations broadcast in a diversity of operating conditions including power, frequency, ground conductivity as well as restrictions imposed by international agreements. As a result, some stations would enjoy the benefits of service improvement at the expense of other stations operating under restricted conditions. Under these circumstances, it remains our view that power increases would achieve the unfortunate result of creating additional interference while not equitably distributing the gains and improvement in service.

38. Therefore, we find that adoption of the proposed value of 2.0 mV/m for the normally protected contour for Class II and III stations at night, as set forth in the Notice, advances the objective of improving the AM service.[24] We also conclude that modification of any other protected contour would stray significantly from the original purpose of reducing interference levels within the AM band. Since we now have a single class of station that includes the previous Class II and Class III stations, we need to pick a value suitable for protecting all of the stations in that class. A higher value, such as 5 mV/m, would expose stations currently protected to values less than 5 mV/m to more interference and a loss of service. A value of 2.0 mV/m for the normally protected nighttime contour is the highest value we can select which will preserve the service of essentially all Class II and Class III stations.

39. Additionally, Section 73.37(b), the exemption which permits a first local AM service to receive interference up to the 1.0 mV/m contour, will be deleted. We continue to believe that this rule encourages substandard operations and permits increased AM congestion and distorted service areas. Such AM operations are inconsistent with our underlying goals to revitalize the AM service and alleviate interference and congestion in the AM band.[25] On balance, we no longer believe that the establishment of a first local service automatically overrides other public interest considerations, such as the control of interference and congestion in the AM band.

C. E_{min} and Noise.

40. **Background/Proposal.** In the Notice, we briefly discussed the relationship between the minimum usable field strength, or E_{min},[26] and noise, both atmospheric and man-

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[24]See paragraph 24, supra, where we noted the overall benefits that would accrue to the AM broadcast service.

[25]For similar reasons, last year we terminated without further action MM Docket No. 88-376, which considered whether to allow stations to accept interference within the normally protected contour. See FCC 90-136 at paragraph 115, page 14.

[26]The value of E_{min} represents the minimum field strength necessary to permit a desired reception quality in the presence of atmospheric and man-made noise.

made.[27] We also discussed various Commission actions taken in the past several years which related to noise within the AM band. (See Notice, paragraphs 32 and 33.) We tentatively concluded that there was no compelling reason to revise these factors.

41. **Comments.** Several commenters expressed the belief that, under most circumstances in the United States today, our present value of E_{min} and the resultant protected contour provide interference protection to signals which are too weak to provide any meaningful quality service. Some commenters, such as Hatfield and Dawson, addressed the issue from a historical perspective, arguing that protected contour value decisions made in the 1930's could not possibly have anticipated the dramatic urbanization that occurred in the following five decades. As a consequence of this urbanization, they argue, both man-made noise and AM signal attenuation are significantly greater today, thereby necessitating higher signal strength values to provide a comparable level of service. Accordingly, many of these commenters expressed the opinion that the protected contour value should be increased to 2 mV/m.

42. A detailed discussion of E_{min} and noise was submitted by Universal Broadcasting Corporation (Universal). Based upon their analysis, Universal recommends that protection of the 0.1 mV/m contour for Class I stations, for both daytime and critical hours, be eliminated. They assert that the daytime 0.1 mV/m contour is insufficient to provide a minimum level of groundwave signal given the presence of atmospheric and man-made noise. Universal also contends that during critical hours, a station's skywave signal can interfere with its own groundwave signal, thus creating a zone of self-interference which reduces the area of effective service. Because of this, they argue, the 0.1 mV/m contour should no longer be protected for Class I stations during critical hours.

43. Other parties commented on the temporal and geographic complexities of the minimum usable field strength problem. Robert A. Jones (Jones), for example, maintains that in metropolitan areas one needs at least 2.0 mV/m to overcome noise but that in rural areas 0.5 to 1.0 mV/m is typically acceptable. Jones asserts that the presence of electrical storms may bring the value to 10 mV/m or more. Comments such as these illustrate the difficulties encountered when attempting to select a single appropriate value for E_{min}.

44. **Discussion.** We have carefully considered all of the comments submitted with respect to E_{min} and noise, and have concluded that revision of these factors is not warranted. Selection of an appropriate minimum usable field strength value is a complex matter dependent on many variables. As noted in the comments, viable minimum usable field strengths vary geographically, seasonally and even with the time of day, depending upon conditions. While it may be true that in some areas of the country, under certain

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[27] Atmospheric noise is created mainly by lightning discharges in thunderstorms. Man-made noise, found mainly in populous areas, arises from sources such as power lines, industrial machinery, ignition systems and appliances.

circumstances, the currently protected value of 0.5 mV/m is insufficient to provide an adequate signal, it is clear that in many areas, under other circumstances, it is an appropriate value. It is not evident, based upon the totality of the information before us, that selection of any other protected contour value would, on balance, provide a more accurate benchmark.

45. Similarly, we cannot conclude from the evidence presented by Universal, that the 0.1 mV/m contour is inadequate to provide Class I service. Universal's study utilized CCIR Report 322-3 (Atmospheric Radio Noise) extensively. Universal has, however, interpreted this data in a different manner than the Commission's staff. Essentially, Universal has taken into account nighttime noise levels when commenting on the minimum daytime field strength for Class I stations needed to overcome noise. We find this approach to be unpersuasive because nighttime noise levels are not relevant to daytime field strengths. Universal used the same analytical approach when considering CCIR Report 258-4 (Man-made Noise). Consequently, we do not find evidence of sufficient reliability which would allow us to conclude with certainty that Class I service does not exist in many cases out to the 0.1 mV/m protected contour and thus should not be protected.

46. The intent of critical hours protection for Class I facilities has always been to provide an adequate measure of protection to the wide area service of such stations during the transitional hours after local sunrise and before local sunset when neither daytime nor nighttime propagation characteristics are fully in effect. While there is no doubt that self-interfering skywave signals can occur during critical hours, we are unable to find based upon the information before us, that the existence of such interference renders the groundwave service totally unusable and thus not entitled to protection. The very concept of critical hours protection involves a recognition of the time dependent uncertainty of propagation characteristics of this particular period. Our experience over the years has shown that our critical hours protection scheme has successfully provided a reasonable degree of interference protection for this time of day and therefore, will remain unchanged.

47. Accordingly, the values of minimum usable field strength, E_{min}, will remain unchanged. Protection requirements for Class I facilities will also remain unchanged with respect to both daytime and critical hours protection.

D. Protection Ratios.

48. **Background/Proposal.** Co-channel and adjacent channel protection ratios prescribe the maximum permissible interference from one station to another. The level of permissible interference is always determined with reference to the protected contour as determined by applying our Rules. The value of a given protection ratio reflects a compromise between maximizing the potential quality of AM reception and the number of AM broadcast stations. The actual reception quality also depends on the bandwidth and other characteristics of the receiver employed.

49. The Notice proposed no change to the current co-channel protection ratio of 26

dB. For the first adjacent channel, the current protection ratio is 0 dB, groundwave-to-groundwave. The Notice proposed to change this ratio from 0 dB to 16 dB for the protection of daytime and nighttime groundwave service. Also, the Notice proposed that both groundwave and skywave service of Class I stations be protected from adjacent channel skywave interference. In this respect, we proposed to modify the skywave to groundwave protection ratio from -13.98 dB[28] to 16 dB and to include a skywave to skywave protection ratio of 0 dB, a type of interference protection not previously specified. For the second and third adjacent channel, the Notice proposed no change.

50. **Comments.** The comments overwhelmingly supported no change in the current co-channel protection ratio, although many commenters proposed to apply that ratio to a different protected contour, as described in paragraph 30 above.

51. The proposal for a change to a 16 dB adjacent channel ratio for groundwave service was supported by NAB, Association for Broadcast Engineering Standards (ABES), Tribune Broadcasting Company, Westinghouse Broadcasting Company and others. Capitol Cities/ABC, Inc. (Cap Cities) and Hatfield and Dawson proposed a ratio of 12 dB to be applied at the 2 mV/m contour (roughly equivalent to the current level of protection). CDE and Edward A. Schober, P.E. proposed 6 dB at the 0.5 mV/m contour and Vir James, P.C., Broadcast Engineering Consultants, KVI, Inc. and D.C. Williams, P.E. proposed 16 dB at the 2 mV/m contour. Many commenters opposed a protection ratio of 16 dB but did not suggest an alternative proposal. Greater Media, Inc. urged the Commission to implement increased adjacent channel protection only in the expanded band, arguing that protection ratio increases will hasten the decline of the AM radio service if applied in the existing band since more stringent protection requirements will foreclose most facility changes.

52. Regarding the proposal for 16 dB protection for nighttime groundwave service (from skywave interference), comments in opposition to the Notice proposal largely focused on the impact that such a change would have on the depiction of coverage and determination of permissible interference, with the latter impact, in their view, serving to freeze existing facilities. No comments were received on the specific subject of providing 0 dB adjacent channel protection to nighttime skywave services (from skywave interference).

53. Few comments were received on the subject of second and third adjacent channel protection. NAB stated that second and third adjacent channel protection should be considered further by the FCC's Radio Advisory Committee. General Motors Research Corporation (GMRC) and Cap Cities cited the September 14, 1990 National Radio Systems Committee (NRSC) resolution that confirms that the NRSC-2 emission standard was developed based on studies assuming that no overlap of 2 mV/m signal contours of second adjacent channel stations would be permitted, rather than the current criteria prohibiting overlap of the 2 mV/m and 25 mV/m contours. Hatfield and Dawson proposed, for the

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[28]The rules refer to this in terms of a ratio of desired to undesired signals, in this case 1:5.

second adjacent channel, that no overlap of the 2 mV/m and 10 mV/m contours be permitted. Cap Cities stated that a change is required since the cost of the necessary IF filters for wide-band reception would be preclusive at the current levels of second adjacent channel protection. Cap Cities also mentioned that the NRSC-2 standard did not address the effects of third adjacent channel interference between closely spaced stations, and also called for further study of this matter by the Radio Advisory Committee.

54. **Discussion.** As stated in the Notice, the Commission intends to encourage and approve those measures which move the service in the direction of the models we have adopted to guide our considerations. We believe that appropriate decisions on the various protection ratios will move the AM service in the direction of competitive technical quality by providing a reasonable expectation that the current high levels of adjacent channel interference will be reduced through facilities modification and migration of stations to the expanded band. Such action is intended to encourage receiver manufacturers to market new wide-band receivers, so that the potential reception quality that would result from the adoption of increased adjacent channel protection may be realized over time. We note in this regard that the NRSC has adopted a Voluntary National Standard for an improved AM receiver with a 7.5 kHz bandwidth called NRSC-3.[29]

55. Regarding the co-channel protection ratio, we consider the record in this proceeding to clearly indicate that no change is required. While we agree with the comments indicating that "talk" programming requires more than 26 dB of co-channel protection, we note that, with the current level of protection, high quality reception of "talk" programming is possible beyond current city-coverage signal levels.

56. With respect to the appropriate level of first adjacent channel protection, we discuss the daytime groundwave service case first. We will continue to protect service to the normally protected contours (0.1 mV/m for Class I stations; 0.5 mV/m for other classes) and will provide increased protection required for wideband reception. However, as demonstrated in the comments, the adoption of the required 16 dB of additional protection at the normally protected contour (e.g., 0.5 mV/m) would largely preclude most needed facilities modifications, thus effectively freezing the AM band at the current level of adjacent channel interference. Nonetheless adjacent channel interference is a real concern, particularly for wide band receivers, and some improvement is needed. A pragmatic solution is suggested by the many commenters who stated that a field strength of 2 mV/m is required for satisfactory wide band reception. Since that is 12 dB greater than a normally protected groundwave contour of 0.5 mV/m, a modest increase in the adjacent channel protection ratio, applied at the 0.5 mV/m contour will serve to enhance both narrow band and wide band reception. Accordingly, we are adopting an adjacent channel protection ratio of 6 dB to be applied at the normally protected contour which will, in practice, provide 18 dB or greater protection to

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[29]See National Association of Broadcasters Comments at Appendix A, page 2. A complete text of NRSC-3 is given in NAB's comments.

wide band service. Although this is slightly higher than the 16 dB figure mentioned above, we consider this 6 dB increase in protection to be the minimum change in protection required to realize improved reception. As improved receivers are marketed with wide and narrow bandwidth capabilities, listeners will be able to realize improved and thus more competitive technical quality wherever AM improvement is achieved in practice.

57. The circumstances surrounding first adjacent channel nighttime protection are significantly different from that of the daytime. Our proposal for daytime adjacent channel protection represents a tightening of the existing protection standard contained in the rules which is applied in a single-signal manner. With the exception of protection to clear channel stations, no nighttime adjacent channel standard now exists and we are now considering the creation of a new standard. Any new standard will place restrictions on many stations where none now exist. Furthermore, this new standard will be applied in a different manner from daytime, utilizing the RSS concept of interference analysis as opposed to the single-signal approach utilized for daytime calculations. Because we are concerned about the restrictive effects of creating an entirely new adjacent channel standard for nighttime operations, we have reconsidered our initial proposal of a 16 dB value. We are persuaded by the commenters who argue that adoption of such a high ratio would impair the ability of stations to make needed facilities modifications. This is particularly so since the first adjacent channel standard represents a limitation where none previously existed. In order to maximize flexibility, and recognizing that scientific studies show that adjacent channel interference should be reduced in order to improve the AM service, we are adopting a more moderate value of 6 dB. This value is consistent with the daytime protection ratio and strikes an appropriate balance between the needs of flexibility for existing station facilities modifications and our overall desire in this proceeding to reduce the interference in the AM band as described in paragraphs 68 to 75 below.

58. Our proposal for 0 dB first adjacent channel protection to skywave service was not opposed. However, this proposal would preclude hundreds of Class B stations from making any facilities modifications because of the extremely large skywave service areas of Class A stations on adjacent channels. Therefore, we believe that this standard would be unrealistic and counterproductive and we will not extend adjacent channel protection to Class A stations' nighttime skywave service.

59. The comments have persuaded us to revise our thinking regarding the second adjacent channel protection levels. The information placed in the record by GMRC and Cap Cities regarding the basis upon which the NRSC adopted the NRSC-2 emission standard is important and relevant. However, we consider the adoption of their proposal to prohibit 2 mV/m and 2 mV/m contour overlap to be too restrictive a method of providing second adjacent channel protection. The NRSC assumed a 0 dB protection ratio in its deliberations on NRSC-2. After careful analysis, we are adopting a prohibition of overlap of the 5 mV/m contours of second adjacent channel stations. Such an action would insure that, within the daytime city coverage contours, full protection from second adjacent channel interference would be obtained. This standard would require station separations nearly identical to those

resulting from the Hatfield and Dawson proposal (no overlap of the 2 mV/m and 10 mV/m contours), and is more desirable because it is consistent with the NRSC standard.

60. No opposition was received to our Notice proposal to leave undisturbed the current third adjacent channel protection standard. We continue to believe that this standard properly balances a station's protection and service requirements. We are maintaining the existing standard of prohibiting overlap of 25 mV/m contours of such stations.

E. Nighttime Interference Calculations.[30]

61. **Background/Proposal.** According to AM broadcasters, a primary reason for their competitive disadvantage vis-a-vis FM stations is that listeners are displeased with the poor quality of AM nighttime reception. The perceived inferiority stems from a number of factors, including the abbreviated and non-corresponding areas of coverage of most nighttime AM operations relative to their daytime service areas, as well as the inherently high level of man-made and natural noise which, when combined with interfering signals from other AM operations, contribute to an overall degradation of service. Consideration of this last factor, interfering signals, has become increasingly important as the AM band has become more congested. The cumulative effect of permitting additional interfering signals, even those that are not recognized as such by the rules, unquestionably has led to a deterioration in AM service.

62. Nighttime interference calculations are performed differently depending on the class of station and related protection criteria. Two methods are used and are related to the type of protection to be afforded.[31] The first method (single signal), considers each individual signal as an interference source and evaluates its acceptability without regard to the presence of other interfering signals. This method is used to evaluate protection afforded to stations designed to provide wide area service (Class I stations) and merely requires that the values of the protected and interfering contour be known. For example, in the case of Class I protection, it is only necessary to ensure that the proposed field strength of an interfering

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[30]During the course of this proceeding, we have not proposed to alter the methodology for calculating daytime interference; and nothing in the record has persuaded us to do otherwise. Thus, in terms of methodology, we have focused only on nighttime interference.

[31]A third method is used for Class IV stations. Class IV stations, however, are unique with respect to nighttime protection in that extremely large numbers share the same channel and have no specific nighttime restrictions. Instead, they are authorized to operate based on daytime separations without regard to mutual nighttime interference. Because of these differences, there would be little benefit in applying to Class IV stations the same rules changes that are being considered for the other classes of stations. Thus, the rules we adopt regarding nighttime interference will not apply to Class IV stations except with respect to the determination of coverage.

signal at or within the Class I's 0.5 mV/m-50% protected contour does not exceed 0.025 mV/m-10%. The second method (multiple signal), considers each individual signal in conjunction with other interfering signals to determine acceptability. This method is used with respect to stations providing small to medium area coverage and is considerably more complicated.

63. The multiple signal method, used to assess the cumulative effects of skywave interference to other stations, requires calculations to be based upon the root-sum-square (RSS) of all interfering signals.[32] Currently, RSS calculations are performed using a "50% exclusion method" which limits the number of interfering signals that must be taken into account.[33] Because the exclusion method ignores lesser interfering signals, as new stations are added or existing stations make modifications, the cumulative effects of the excluded interference contributions can, over time, substantially increase the disparity between the true RSS and the RSS calculated using the 50% exclusion method.[34] Except for protection to Class I stations, adjacent channel skywave signals are not considered in the interference calculations.

64. Adjacent channel nighttime protection is currently provided only to Class I stations at their 0.5 mV/m nighttime groundwave (primary service) contours. This requires a first adjacent channel Class II station to restrict its field strength at any point on the Class I protected contour to a value of 2.5 mV/m-10%. For other classes of stations, the present rules do not consider the presence of adjacent channel skywave signals or provide for protection among them.

65. The current method of determining nighttime interference as described above was adopted many years ago to provide for orderly development of the AM broadcast service. The number of stations grew but at the expense of incremental increases in actual interference. In the Inquiry, therefore, we questioned whether it would be appropriate to limit increased interference from other stations by considering adjacent channel nighttime skywave

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[32] See Section 73.182 of the Rules. The RSS is a mathematical procedure which involves taking the square-root of the sum of the squares of interfering signals. This is often referred to as the E_u for the subject station and represents the usable field strength for the station in the presence of interference from other stations. It is used for both interference and coverage purposes. The FCC rules require that the normally protected contour, E_{nom}, or the E_u be protected from interference, whichever is greater.

[33] This method incorporates a procedure for determining what interfering signals may be disregarded. Ignoring sources of interference facilitates the implementation of new or modified nighttime operations and minimizes the number of calculations required. This latter point, a major consideration at the time this method was formulated, is no longer relevant with the advent of inexpensive computers and comprehensive databases.

[34] An illustration of this is included in Appendix C.

interference in the RSS calculations and by reducing the RSS exclusion value from 50% to 25%. The reaction was mixed but generally construed our stated alternatives to be an insufficient response to the considerable difficulties facing the AM service.

66. In view of the response to the Inquiry, the Notice proposed even tighter protection criteria. We proposed to eliminate entirely the RSS "50% exclusion" methodology and to consider, instead, all signals as potential sources of interference.[35] Also, we proposed to consider adjacent channel signals in the interference calculations. We further proposed that each station's individual limitation toward any other station not exceed 1.0 mV/m, with appropriate adjustments for protecting skywave service of Class I stations. Additionally, we proposed to require existing stations that already exceeded this 1 mV/m threshold to reduce their signal to other stations by 10% in order to receive an authorization to modify their facilities. Finally, although no longer required for determination of station protection under our proposal, we proposed that RSS calculations (0% exclusion) would be used to evaluate city coverage of a station and to compute the ranking factor for migration preference purposes.

67. **Comments.** Commenters generally opposed the use of the new methods, citing the resultant lack of flexibility for stations to make any necessary changes or to upgrade. Those who opposed the RSS 0% exclusion proposal noted the resultant diminution of service area when currently ignored interference contributions are included in the RSS calculation. A number of these comments recommended as an alternative that RSS calculations be performed using the RSS 25% exclusion method. A dozen commenters opposed the RSS 0% exclusion proposal, while 26 commenters registered their opposition to the concept of 10% signal reduction. Those who supported our proposals generally requested some degree of flexibility for situations involving circumstances that are beyond the control of the licensee. While there was support for an adjacent channel protection standard, there was general reluctance to commit to any specific value at this time. The comments also referred to natural and man-made noise as the preponderant factor governing nighttime interference instead of signals emanating from other operations. However, no significant new data to support this view was supplied by those commenters.

68. **Discussion.** Our review of the record convinces us that the proposals we made are sound, reflect the best predictors of interference and service available today, and provide a mechanism to not only prevent continually increasing interference in the existing AM band but also reduce, in some cases, existing levels of interference. Two of our proposals are fundamental to our efforts to improve AM nighttime interference calculations. They are RSS 0% exclusion and inclusion of adjacent channel signals. It is noteworthy that the record supports these concepts. The disagreement is not with the concepts themselves but rather with the impact of their application, most notably the lack of flexibility and reduced coverage showings.

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[35]In effect, we proposed to use an RSS "0% exclusion" method.

69. After further evaluation of the proposals, we recognize that a key element of our proposals, the shift to the single signal protection concept, is also most difficult to achieve without impacting the ability of some existing stations to modify their operations. As stated in the Notice, such a shift (to a lower value e.g., 1 mV/m) would have the benefit of potentially reducing interference in the AM band. It also would simplify the interference calculation. We agree with commenters, however, that the threshold level of 1 mV/m for protection purposes may be ideal but in many instances it is impractical. For example, a station limited to a high RSS (e.g., 20 mV/m) is not significantly impacted by another station that raises its contribution slightly above the threshold of 1 mV/m.[36] The ultimate question is what is the test for significance for these types of situations. We find that a major difficulty inherent in the proposed rules relates to the need to find a specific value that would define interference as significant and trigger the need for a 10% reduction in signal level. We have concluded that in a mature band such as the AM band, a single value that would represent a significant increase in interference is extremely elusive because of the many various combinations that require consideration. Also, we are not convinced that the discovery of a single value would be translated into tangible benefits since the concept requires voluntary actions of stations (i.e., facilities modifications), the type and quantity of which cannot be predicted, as a prerequisite for a 10% signal reduction. Thus, we are adopting a modified proposal that incorporates the basic ideas and adjusts the remaining ones.

70. The modified approach we have developed adheres to our basic goal of improving the AM service by reducing or restricting increased interference. Although the interference reducing benefits of the modified approach are not as pronounced as our original proposals, they are still directed to our overall goal while accommodating several of the concerns of the commenters. In effect, it provides a balance between the ideal and the pragmatic. The modified approach we adopt is as follows. In the determination of nighttime interference, all skywave signals (co-channel and first adjacent channel) are considered.[37] The single signal concept is replaced with an RSS concept that distinguishes between three significant levels of interference. First, the highest interferers are those that contribute to another station's RSS (50% exclusion); these interferers would be required to reduce their contribution to that RSS by 10% if and when they apply for a change in facilities.[38] Second, the next level of interferers are those that contribute to the RSS (25% exclusion) but not the RSS (50% exclusion); these stations would be authorized facilities changes if no increase in radiation is involved. Finally, the lowest level of interferers are those that are no greater than the RSS

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[36]See Appendix C.

[37]The method of considering first adjacent channel skywave interference, a heretofore ignored contribution, is to be accomplished in much the same way as co-channel contributions, except that each limit will be evaluated after applying a 6 dB weighting factor to the radiated signal (as opposed to the 26 dB factor used for co-channel signals).

[38]It is noted that a 10% reduction in the contribution to an RSS requires a 10% reduction in radiation at the appropriate vertical angle.

(25% exclusion) and which would be permitted to increase radiation as long as the RSS (25% exclusion) threshold is not equalled or exceeded. Essentially, we have used the well-known RSS method with 50% and 25% exclusion values to classify existing co-channel and adjacent channel stations as high, medium and low interferers. High interferers must reduce interference, medium interferers may preserve the status quo, and low interferers may make modest changes. Finally, a new station may be authorized only if it qualifies as a low interferer with respect to any other station on the same or first adjacent channel.

71. We turn now to relevant concerns of the commenters and the impact of our modified approach. Three points stand out - flexibility, coverage, and noise. Of the three, flexibility is the most difficult to resolve because it requires a balance between our overall goal of reducing interference in the AM service and the understandable desire of broadcasters to improve their stations. The balance is delicate because as interference restrictions increase, flexibility decreases. Recognizing that our proposed rules would severely limit station modifications, we note that the modified approach relaxes the restrictions and is not as limiting. We believe that this action may satisfy some of the commenters concern. Moreover, we are aware that often licensees are required to make changes to their stations because of circumstances beyond their control (e.g., loss of site and antenna maintenance difficulties).[39] Under those circumstances, we would take a close look at the facts presented and rule on the appropriateness of a waiver, just as is available under the current standards. For these reasons, we believe the rules we adopt today provide an appropriate balance between two desirable but conflicting needs.

72. With respect to coverage, considerable opposition to the revised RSS approach focused on the resultant reduction of predicted nighttime service which would occur when calculating new interference-free contour values for coverage purposes. It is obvious that inclusion of additional co-channel and adjacent channel contributions would increase calculated RSS values. At the same time we recognize that a reduction in coverage, even if theoretical rather than actual, translates into an apparently reduced market and possibly reduced revenue for AM licensees. While we believe it would be proper to adopt this more accurate calculation technique, we recognize the merit in not including all signals in the RSS calculations since no convincing evidence has been presented to warrant a substantial alteration of the currently practiced method of coverage prediction.

73. Including first adjacent channel signals in the RSS calculations and incorporating

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[39]We also recognize that certain circumstances that may be beyond the control of the licensee would prevent a 10% reduction because of a conflict with other Commission rules, such as those requiring compliance with minimum efficiency criteria or where specification of the standard pattern "Q" factors would not achieve proper tolerance. See 47 CFR, Section 73.150. In such situations the Commission would allow, on a case-by-case basis, for some flexibility for exceptional cases where reduction could not be performed without the waiver of other technical requirements.

the new skywave propagation model, will change virtually all nighttime interference-free contour values. Consequently, corresponding coverage maps will also change. As we are maintaining a 50% exclusion for the RSS calculation, the coverage depictions for many stations should not be altered dramatically from those which existed under the previous standards. Therefore, we shall not impose any requirement for a universal re-mapping of service contours. This will be left to the discretion of the individual licensee, or until such time as an application is filed for change in facilities which would itself alter the station's service area.

74. The only exception to use of the RSS with 50% exclusion for coverage purposes is the determination of an improvement factor for a station seeking to migrate to the expanded band. Because there is a need to distinguish between all stations with respect to interference caused and received, an impossibility using a 50% exclusion method, and because the practical problems associated with a reduced coverage depiction will be neither relatively significant nor relevant to the improvement factor process, the 0% exclusion method will be utilized within the context of the expanded band migration eligibility calculations.

75. Finally, with regard to noise, we agree that noise is certainly a factor which warrants consideration; however, based on the record of this proceeding, we are not persuaded that interfering signals from other stations are less significant than ambient noise in the evaluation of the overall problem. Therefore, any solution which concentrates primarily on overcoming local noise thresholds, such as universal power increases, can only serve to exacerbate the existing problem by also raising the base interference level.

F. Nighttime Enhancement.

76. **Background/Proposal.** Recognizing that daytime-only stations face serious disadvantages because of their inability to operate at night, the Commission has initiated several rulemaking proceedings that addressed this limitation on station operation and sought ways to permit fulltime operation to the maximum extent possible consistent with sound engineering practice. Significantly, actions taken in a series of proceedings have allowed many daytime-only stations to operate during nighttime hours.

77. Specifically, by Commission action taken in MM Docket No. 87-131, Class II and Class III daytime-only stations were individually authorized to operate at night with power levels that the Commission determined would avoid the creation of new interference. These stations were generally reclassified as Class II-S and Class III-S stations. The Commission granted this relief for daytime-only stations while focusing on the need for complete protection of existing fulltime licensed operations. Stations operating under such authority were not protected from existing nighttime operations, from each other, or from any future nighttime operation that proposed full nighttime facilities. For such stations, the permissible power level, a function of the interference protection restrictions, was calculated based on the daytime or, if applicable, the critical hours antenna systems of the daytime-only stations. Class II-S and Class III-S stations which were authorized power levels which met or exceeded

the minimum radiation value for a full nighttime operation (i.e., 141 mV/m at 1 km) were subsequently upgraded to primary status and were afforded the benefits of full protection.

78. In MM Docket No. 88-509, we proposed further steps to enhance the opportunity for daytime-only stations to improve their nighttime operations while at the same time maintaining existing interference protection requirements. The Notice observed the close relationship between the MM Docket No. 88-509 issues and those considered herein and concluded that the issues and record should be incorporated in this proceeding. Notice at paragraph 24.

79. In essence, therefore, the Notice, in accordance with MM Docket No. 88-509, proposed the relaxation of current restrictions that prohibit Class II-S and Class III-S stations from establishing separate nighttime antenna systems and upgrading their nighttime operations to facilities that do not meet the minimum protected power level of 250 watts (or the equivalent 141 mV/m at 1 km). The proposal, for example, would allow, on a non-interfering basis, a station with a relatively low nighttime power, such as 30 watts, to increase to a higher value, such as 80 watts, by using an antenna configuration different from its daytime system, something not presently permitted unless at least 250 watts is requested. Also proposed were changes to requirements regarding minimum power, city coverage or minimum operating schedule. Proposed also in MM Docket No. 88-509 was the option of defining all such nighttime enhancement proposals as "minor changes" - even those requesting power increases.

80. Finally, we proposed that unlimited-time Class II and Class III stations be allowed to reduce their nighttime power to a level below the established minimum and thus be reclassified as Class II-S or Class III-S stations. Under these circumstances, we reasoned that such stations would lose their rights to interference protection and that city coverage and minimum operating schedule requirements would be retained for stations which elect to make these voluntary power reductions. Comment, however, was sought on exempting such stations from the coverage requirements.

81. **Comments.** In response to the Notice, few comments were received specifically addressing the nighttime enhancement issue for daytimers. CBS, however, did suggest that any enhancement request be restricted to a maximum power ceiling of 250 watts. Two other commenters, KLOK and KQV, opposed the proposal, while Alabama Native American Broadcasting supported the use of separate day and night antenna systems. Those comments received in direct response to MM Docket No. 88-509 were generally favorable. Most agreed that existing Commission Rules that prevent Class II-S and Class III-S stations from increasing nighttime power from originally authorized levels to levels below 250 watts coupled with the required use of existing daytime antenna sites and systems for nighttime operations constitute burdensome restraints on night operations. Most parties also agreed that the proposals to remove these constraints were sufficient to significantly increase the operational flexibility needed by such stations to improve the efficiency and competitiveness of their nighttime operations.

82. With regard to the minor change filing procedures, those who supported such processing did so because they felt major change procedures would be too cumbersome, too complex and too financially burdensome. Others contended that major change processing would deter station operators from seeking enhancements in order to avoid the risk generally inherent in such processing procedures, namely the possibility of contending with competing applicants. Those in support of major change processing stated that it was necessary so that unlimited-time stations who anticipated interference would have ample time and opportunity to make independent assessments of the engineering statements filed in support of the proposed enhancements. Some commenters stated that some opponents of a proposed enhancement application might take advantage of the petition to deny procedure that is available under major change processing regulations.

83. There was overall support for the proposal to permit stations to downgrade from fulltime Class II and Class III operating status to Class II-S and Class III-S. However, despite the consensus favoring such reclassification, commenters disagreed on the city coverage, operating hours and interference protection issues. A majority of the parties who commented on the city coverage issue opposed imposition of that requirement on reclassified stations. Also, most parties who addressed the operating hours requirement, opposed requiring reclassified stations to operate for minimum number of hours. With respect to the interference protection issue, most commenters opposed providing interference protection to reclassified stations.

84. **Discussion.** After thorough review of this matter, we will adopt changes in the current rules to facilitate both the technical enhancement of nighttime operations by Class II-S and Class III-S stations and the overall improvement of service to the listening public. We will also permit those unlimited-time Class II and Class III stations, that find it advantageous to do so, to reclassify their nighttime operations as Class II-S and Class III-S and to operate under the same terms as existing Class II-S and III-S stations. We believe that these changes will aid in our overall effort to permit daytime-only stations the opportunity to provide meaningful nighttime service and to provide added flexibility to fulltime stations who are suffering economic difficulties.

85. With regard to enhanced nighttime operations for Class II-S and III-S stations, we will now permit such stations to increase their nighttime power from the level originally authorized to any intermediate level below 250 watts (or the 141 mV/m at 1 km radiation equivalent). We will also permit such stations, when they are operating below the 250-watt level (141 mV/m at 1 km), to use operating parameters which differ from their daytime antenna values and to operate these new systems at either their existing daytime or at new nighttime sites.

86. Our decision to make these rule changes is further supported by our recognition of certain infirmities of the current restrictions applied to Class II-S and Class III-S operations. Since the authorizations were issued on a strictly non-interfering basis, in many cases the authorized powers are too low, their antenna sites are too distant from their

communities of license, and their antenna systems are designed specifically for the technical requirements of daytime operation without regard to possible nighttime operation. Thus, in many instances, stations have elected to not use their nighttime authorizations. Our actions in this area reflect an awareness that further steps were needed to remove constraints on these stations and to thereby enable them to improve their nighttime operations and provide better service to their listening audience, while at the same time maintaining interference protection to unlimited-time stations.

87. Further, we have decided that applications filed by stations seeking to implement enhancement proposals will be processed as minor changes under Section 73.3571(a)(2) of the Rules. Section 73.3571(a)(1) of the Rules defines "major change" applications as those that propose an increase in power, or a change in frequency, hours of operation or station location. The only definition in that section that is relevant to these proposals is the one regarding an increase in power. Since, unlike most other power increases defined as major changes, these proposals would typically involve only a modest increment in power for what is essentially a secondary nighttime service, we believe that such changes should be classified as minor changes. Moreover, as relatively low power, secondary operations, no preclusion to other stations could occur, and service provided by these stations would be limited and would not be subject to protection from fulltime stations, providing relatively little, if any, increase in service beyond the community of license. As a result, the concepts embodied in our major change processing procedures would not be applicable and could result in unnecessarily delaying improvements to these stations. This action does not alter the basic right of parties to file informal objections under the minor change processing procedures nor does it diminish Commission scrutiny since the engineering analysis applied to major and minor change applications is essentially the same.

88. We will also permit unlimited-time Class II and Class III stations to reclassify their nighttime operations as Class II-S and Class III-S stations and to operate below 250 watts (141 mV/m at 1 km equivalent) under the same terms as existing Class II-S and Class III-S stations. Since AM applications for power reduction are currently treated as minor change applications, it would be logical to extend that treatment to these cases. Thus, such applications will be processed as minor changes under Section 73.3571(a)(2) of the Rules. These stations will receive no protection from interference, will be required to provide protection to unlimited-time stations, and will be exempt from meeting nighttime city coverage and minimum operating schedule requirements.

89. Additionally, we will permit Class II-S or Class III-S stations to use rooftop or other unconventional antenna systems at night. Such stations may benefit from using inexpensive, short, and easily mounted antennas which are cost-effective and may promote expedited nighttime service. However, we will not compromise the efficacy of our interference reduction efforts for this purpose and therefore, will require detailed engineering showings to accompany any application where such an antenna is proposed as well as a subsequent proof-of-performance demonstrating proper system operation.

G. Advanced Antenna.

90. **Background/Proposal.** The Notice observed that the NAB was conducting tests on new types of antenna systems that might improve the AM broadcast service. We proposed to defer changes in the rules until testing and analysis of such systems had been completed.

91. **Comments.** Few substantive comments were received on the topic of advanced antennas other than from the NAB, which submitted detailed studies describing two separate antenna testing programs - the skywave suppression antenna and the low profile antenna. The results of the skywave suppression project revealed that the system would not provide a consistent reduction in skywave interference. However, according to the NAB study, the low profile antenna showed some promise.[40] The NAB urged that we adopt rule changes that would allow testing and use of standardized low profile antennas even though they do not meet current FCC minimum efficiency limits.

92. **Discussion.** Initially, we commend the NAB and others for their continuing efforts directed at the development of improved antenna systems for use in the AM band. We encourage the continuation of these and other related antenna projects which show promise for the improvement of this service.

93. At issue is whether it is appropriate at this time to revise our rules in order to accommodate standardized versions of either or both of the antenna systems described above for use in the AM service. As noted in the comments, results of the skywave suppression antenna have been inconsistent and we believe no further Commission action is warranted at this time. Results of the low profile antenna are more encouraging. However, Commission action on the low profile antenna at this juncture would be premature since it would be based upon a limited record of actual field test data. Accordingly, we encourage further testing of this antenna design and to the extent possible, we intend to give favorable consideration on a case-by-case basis to any requests which might help develop the record of actual field test data. Commission action on a standardized version of the low profile antenna will be deferred pending the development and analysis of such a record.

H. Split Frequency Operations.

94. **Background/Proposal.** Split frequency operations utilize one assigned carrier frequency during daytime hours and a second carrier frequency during nighttime hours of operation. Such operations could be attractive to daytime-only stations which are unable, due to technical restrictions, to use their daytime frequency for nighttime operation, as well as to new fulltime stations which cannot find a viable single channel for both modes of operation. We have interpreted our Rules as not permitting split frequency operation, although in one

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[40]The low profile antenna is a physically small, free standing structure with a minimal ground system.

case we granted a waiver to permit such operation. Birach Broadcasting, 4 FCC Rcd 4461 (1989).

95. Split frequency operations are generally considered to be spectrally inefficient. Unless the two frequencies to be used are within close proximity to each other, the preclusion by split frequency operations involves as many as 14 different frequencies as opposed to the 7 frequencies (one co-channel and six adjacent) where preclusion occurs for a typical single channel operation. The difficulties extend to the listenership as well, since the audience is forced to re-tune their receivers at sunrise and sunset to preserve a continuous programming source. In view of this, the Notice proposed the elimination of this particular form of operation.

96. **Comments.** Most comments addressing this subject agreed that further authorizations of this type of operation would not be desirable and that each station should be required to use the same frequency during day and night hours of operation. However, E. Harold Munn opposed our dismissal of this form of operation, stating that it could be a useful tool for providing additional service when used in the proper circumstances. Schober also encouraged split frequency use on a case-by-case basis.

97. **Discussion.** Because of the greater level of complexity of split frequency operations and the potential for increased preclusion of other conventional facilities, split frequency operations should generally be disfavored. However, we do agree with those commenters that under very special and unique circumstances, the public service arguments for authorizing such an operation may outweigh the aforementioned liabilities. We will consider waiver requests where sufficient supporting technical information is submitted to establish that no preclusion to other full time stations would occur, and that the greater public interest can be achieved through issuance of such an operating authority. Nevertheless, we do not agree that adequate justification exists to create a separate body of rules to govern such operation. Therefore, we are amending Section 73.3516 of the Rules to more clearly exclude split frequency operations.

I. Summary of Technical Standards.

98. In this section, we have (1) adopted new first and second adjacent channel protection standards, (2) revised nighttime coverage and interference calculations, (3) allowed possible enhancement of nighttime service by certain Class D stations and most importantly, (4) adopted a rule that would reduce interference to some stations when certain facilities modifications are authorized. As a group, these rules should lead to a significant, although gradual improvement in AM signal quality.

IV. Migration to the Expanded Band

99. The second element of our plan for improving the AM service is the selective

migration of existing AM stations into the expanded band. This migration offers a unique opportunity for the improvement of AM broadcasting. By adopting appropriate rules for the use of the expanded band, migrating stations will operate in a new environment where Model I service should be achievable by all stations.[41] Furthermore, after the completion of the migration process, there should be a general reduction in interference levels in the existing band, helping achieve the goal of Model II service for existing stations.[42] These changes should benefit all licensees and the public as a whole, as the quality and perception of the AM service improves. However, the extent of improvement depends, in part, upon the selectivity of the migration process. Migration of AM stations from the existing band should reduce interference and congestion in the existing band and should offer a prompt method for establishing service in the expanded band. We now consider the various issues that must be resolved in order to accomplish these goals.

100. In this section, we address the many issues related to the migration process. They are: (1) wide station separations and low interference levels; (2) migration eligibility; (3) existing stations causing interference and preferred migrators; (4) allotment or assignment options; (5) sample allotment plan; (6) the selection process for migrating stations; (7) ownership limitations and transition period; (8) expanded band technical standards; and (9) city coverage for expanded band stations.

A. Wide Station Separations and Low Interference Levels.

101. **Background/Proposal.** Migration of AM stations from the existing band into the expanded band is a fundamental feature of our plan for AM improvement. In the Notice, we expressed our preference for an expanded band environment which would utilize relatively wide spacings between stations to produce reasonably low interference levels. We also expressed our initial reservations regarding the use of elaborate multi-tower directional antenna systems in the expanded band, stating instead our preference for nondirectional or simple directional antenna systems. In this regard, we discussed the appropriateness of the characteristics of the Model I facility for the expanded band. Consistent with this Model I definition, we made a preliminary estimate that 25 to 30 stations per channel could be accommodated in the expanded band.

102. **Comments.** Commenters were supportive of many of the idealized characteristics proposed in the Notice for stations migrating to the expanded band. Most agreed, for example, that fulltime service should be an essential feature for the expanded

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[41]Model I station features include fulltime operation with stereo, competitive technical quality, 10 kW daytime power, 1 kW nighttime power, non-directional antenna (or simple directional), and 400-800 km spacing between co-channel stations.

[42]Model II station features include fulltime operation, competitive technical quality, wide area daytime coverage with nighttime coverage at least 15% of daytime coverage.

band. E. Harold Munn Jr. and Associates (Munn) took issue with the proposed power limitations for the expanded band, arguing that the minimum nighttime power should be reduced to 250 watts in order to maintain flexibility. Munn contends that this would permit the use of simpler directional antennas. Other commenters urged that we allow higher power levels in the expanded band to compensate for the poorer propagation characteristics of these higher frequencies. Several parties argued that the use of directional antennas would be necessary for efficient utilization of the expanded band and that we should not discourage or limit their use. Other commenters contend that, in addition to the Model I characteristics listed, we should specify minimum tower height requirements for the expanded band to reduce skywave components and enhance efficiency.

103. A few parties expressed the belief that the proposed expanded band Model I technical parameters would not produce results consistent with the stated goals in terms of coverage areas, nighttime interference free contours and number of stations per channel. Cohen, Dippell and Everist submitted an analysis to demonstrate that instead of 25 to 30 stations per channel, as mentioned in the Notice, their calculations show "approximately 5 (certainly less than 10)" stations can be assigned per channel.[43] This study was based on an assumption that all stations on a channel would be protected at night to their 2 mV/m contours. Lahm, Suffa and Cavell and duTreil, Lundin and Rackley submitted related analyses demonstrating that based upon proposed spacings and non-directional antennas, nighttime limits would be higher than anticipated in the Notice, ranging from 6.4 mV/m to 17.3 mV/m. This would result in smaller nighttime service areas than contemplated in the Notice, they contend. Although the specifics of these studies disagree somewhat, due to differing assumptions, their conclusion generally is that the Model I technical parameters are not consistent with the service goals articulated in the Notice.

104. **Discussion.** One of our goals in this proceeding is to create an expanded band environment with relatively wide station separations which would result in reasonably low interference levels. We continue to believe that adherence to carefully crafted expanded band characteristics, such as the Model I parameters, is essential to accomplish this goal. For example, use of significantly lower nighttime power than the proposed 1 kW level would result in smaller nighttime service areas. Similarly, complex multi-tower directional antenna systems which produce irregularly shaped service areas are not consistent with our overall coverage ideals. Use of non-directional or simple directional antenna systems prevents the problems associated with the "shoehorning" of stations which are common in the existing band. The suggestion of some commenters that power levels greater than 10 kW be allowed is not a viable option since the maximum power is restricted to that value by international treaty obligations. Additionally, we do not believe that specifying a physical tower height minimum for the expanded band, as suggested by a few commenters, is necessary since minimum efficiency requirements are sufficient to preclude the use of physically short antenna systems.

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[43]See Cohen, Dippell and Everist, P.C. comments at 28.

105. The parties that maintained that our Model I technical characteristics are not consistent with our service goals base their arguments on studies that assumed that our desired value for E_{nom} was to be used as the value for the nighttime interference-free contour and protected accordingly. Interference prevention in the expanded band will be based upon the station separations of the allotment plan rather than a requirement for case-by-case protection of a nighttime interference free contour as is used in the existing band. Our initial calculations performed at the time of the Notice yielded predicted nighttime RSS values considerably higher than 2.0 mV/m. Our initial estimate of 25 to 30 stations per expanded band channel was intended to represent the potential upper limit of the number of stations that could be accommodated per channel. Clearly, this estimate was made in an environment of considerable uncertainty with regard to many pertinent parameters. It was never our intention that the 25 to 30 station per channel estimate be viewed as a specific primary goal for the expanded band to which other considerations would be subordinate.[44]

106. While we will require expanded band operations to use at least Model I parameters, there may be special cases which warrant the authorization of other than Model I parameters. In such situations, the protection to be afforded co-channel and first adjacent channel allotments from skywave and groundwave interference in any part of an allotment area shall be equivalent to the protection afforded by Model I facilities implementing the designated allotment and will be determined on a case-by-case basis.

107. An example of a variation from our general concepts relates to the potential for allotments to be located in coastal areas. In such situations, it may be appropriate to space allotments at shorter distance intervals and to specify a simple directional antenna system (2 or 3 towers) in order to provide full protection to all stations. We do not anticipate drastic short-spacing of facilities which would require deep directional pattern nulls, but rather moderate degrees of suppression to compensate for marginally short-spaced allotments. This flexible approach offers at least two benefits. First, it could possibly satisfy migration demands that would be otherwise be prohibited. Second, it could allow stations to operate with power greater than 1 kW, an attractive option for stations located in coastal urban areas. With proper design, a system could be developed that would provide equivalent protection and yet provide significantly increased service areas. In situations such as these, where a major lobe of the pattern could be directed out to sea, with no potential for interference, consideration could be given, on a case-by-case basis, to the possibility of 10 kW nighttime power.

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[44]In developing the sample allotment plan, we have found our initial estimates of the capacity of the expanded band to be somewhat high. Due to a number of reasons, including changes in our initial approach and the locations of stations submitting letters of intent, the expanded band capacity appears to be less than we estimated. A precise figure for the capacity of the expanded band is not available because of the flexible approach that we plan to use in creating the allotment plan. For a complete discussion of the sample plan, see paragraphs 130 to 134, and Appendix D.

B. Migration Eligibility.

108. **Background/Proposal.** The Notice proposed to limit initial eligibility to occupy the expanded band to existing stations. The objectives of such migrations are to reduce interference and congestion in the existing band, and provide an expeditious means of establishing service in the expanded band. In the Notice, we tentatively concluded that the public interest would be best served by using the expanded band to improve the overall quality of the AM service by lessening interference and congestion in the existing band. The Notice also observed that reserving channels in the expanded band for minorities, women and/or public radio would not be consistent with the public interest objectives of reducing interference and congestion and improving technical quality in the existing AM band.

109. **Comments.** The comments overwhelmingly supported our proposal to initially preclude new applicants from applying for channels in the expanded band. NAB, reflecting the majority of commenters, asserted that the limitation of eligibility to existing stations would assure reduction of interference in the conventional band and concurred in our preliminary view that the Commission has the legal authority to impose such a limitation. However, we received comments from several parties, in particular Multilingual Communications Association and Global Broadcasting System, Inc., opposing any proposal that would restrict minorities and women from applying for channels in the expanded band. These same commenters also suggested that channels be set aside for minorities and women. In a similar vein, NPR, Bellevue School District and Wright State University suggested that channels be set aside for public radio.

110. **Discussion.** We will restrict initial eligibility for expanded band allotments to existing AM licensees.[45] We are convinced that such a restriction is essential if we are to achieve the level of interference and congestion reduction in the existing band which might revitalize its competitive standing. There are only ten expanded band channels and the loading restrictions placed on these channels by the wide separations and stricter technical requirements necessary to ensure quality service are substantial. Indeed, as our sample allotment plan demonstrates, the band will likely accommodate fewer than 200 of the nearly 5000 existing band stations. Under these circumstances, we must strictly manage migration to maximize the interference and congestion reduction benefits of each allotment awarded.[46]

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[45]As stated in paragraph 6 above, our action here initially restricting eligibility for expanded band authorizations to existing AM licensees is intended to redress the unique technical problems present in the AM service. It should not be taken to suggest any generalized Commission policy favoring existing licensees over new entrants in other services where new or expanded opportunities may arise. The Commission remains fully committed to our diversity goal of providing opportunities for diverse voices in local communities.

[46]The Notice did not propose to include Class IV stations as eligible migrators. The record in this proceeding has not persuaded us to alter our position. Class IV stations are intended to

Permitting new applicants, whose use of an expanded band channel would contribute nothing to reducing interference or congestion, is simply inconsistent with these requirements.[47]

111. Minority, female or education service set-asides in the expanded band pose similar difficulties. Because applicants in these categories would also be new entrants rather than existing AM broadcasters, reserving even one channel for their exclusive use would assure a 10% decrease in expanded band resources dedicated to interference and congestion reduction. Moreover, because the locations of stations on any set-aside channel would restrict the sites of stations on adjacent channels, a single channel set-aside would impose additional restraints on our flexibility beyond the initial 10% reduction in expanded band capacity which it necessarily involves. In sum, given the level of interference and congestion in the existing band and the significant constraints imposed by quality considerations on the expanded band's capacity, we do not believe set-asides or reservations for applicants which will not contribute to the improvement of existing band conditions are feasible at this time.

112. We recognize, of course, that increasing the levels of minority and female ownership promotes diversity and therefore advances the public interest. We also recognize that in some areas there may be a desire for additional public radio outlets and that existing spectrum in the FM band may not be sufficient to fulfill that desire. The difficult choices we make here do not suggest any diminished concern on our part for the benefits which our existing minority and female preference policies and educational reservations have long provided. Rather, they reflect the hard reality that overall AM improvement will require all

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provide local service to relatively small communities without regard to either service or interference beyond their immediate service areas. There are approximately 1,300 Class IV stations assigned to the six local channels. These stations are, in most circumstances, operating at a power of one kilowatt, day and night, without consideration of interference to other Class IV stations. We have received 54 letters of intent from Class IV stations expressing a desire to migrate to the expanded band. Even if all 54 of these stations were to migrate to the expanded band, we continue to believe that relatively little, if any, overall improvement in AM reception would result. It is also our view that the record in this proceeding does not establish that the migration of Class IV stations would significantly reduce overall interference caused to adjacent channel Class III stations.

[47]Consistent with Ashbacker Radio Corporation v. FCC, 326 U.S. 327, 333 n.9 (1945) and United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), we are permitted to restrict initial migration eligibility to existing AM stations. In Ashbacker, the Supreme Court held that the Commission is required under Section 309 of the Communications Act to give comparative consideration to all bona fide mutually exclusive applications. In so holding, the Court did not preclude the Commission from establishing threshold qualifications that must be met before applicants are entitled to comparative consideration. Subsequently, in Storer, the Court held that in the context of a rule making proceeding, the Commission may establish standards that applicants must meet in order to receive comparative consideration.

available resources. We note, of course, that to the extent initial migration to the expanded band does not exhaust its capacity, new applicants, including noncommercial educational parties, and minority and female applicants whose comparative preferences would be fully effective, will have an opportunity to seek authorizations.

C. Existing Stations Causing Interference and Preferred Migrators.

113. **Background/Proposal.** While limiting migration explicitly to current AM licensees broadly addresses the problem of congestion in the existing band, our improvement efforts would be even more effective if eligibility were further focused to encourage the heaviest contributors of interference among existing licensees to migrate. Therefore, the next issue is whether existing stations causing interference should be preferred migrators to the expanded band. Related to this is the recognition that the AM band contains many diverse types of operations, some of which cause or receive varying amounts of interference during different periods of operation and would realistically provide varying benefits if they were to migrate to the expanded band. Thus, to create the regulatory framework that would offer the greatest hope for AM improvement, there is a need to establish a system of preferences within the broader group of those stations eligible to migrate.

114. The Notice proposed that existing fulltime licensees who would most reduce interference and congestion by moving to the expanded band should be preferred applicants for slots in that band. If no fulltime station asked for a particular channel in a given area, the next priority would go to daytime stations located within the 0.5 mV/m-50% skywave contours of Class A stations and which are licensed to serve communities of 100,000 or more that currently lack a local fulltime aural service. Next priority would go to other daytime-only stations that under current rules cannot operate at night. Finally, for the remaining daytime-only stations we proposed that the ranking would be based on power calculated in accordance with current Section 73.182 of the rules, with stations to be ranked in order of least to most power output.

115. **Comments.** Comments on our proposal to encourage migration of existing stations causing the most interference were mixed. NAB argued that daytime interference should be a preference factor and supported relief for daytimers in the expanded band. Additionally, although expressing general support for the proposal, NAB believed we should give migration preferences to remedy intermodulation problems that occur in some of the newer digital receivers. Other commenters also believed that daytime interference should be considered. The Association for Broadcast Engineering Standards believed that a secondary priority should be awarded to non-commercial applicants.

116. Commenters in opposition voiced a wide variety of concerns and offered suggestions for different migration preference factors. A common argument from many consulting firms, some of which supported their contentions with detailed examples, was that the stations which the FCC would most prefer to migrate, have the least incentive to do so because they are the older, well established fulltime stations, which cause the most

interference, but also have the largest coverage areas.[48] In many cases, the older stations would suffer large losses in service area if they were to migrate. The commenters who advanced this argument believe that preferences should go to stations that receive high levels of nighttime interference and, consequently, have small interference free service areas. Great Empire Broadcasting urged that the FCC switch its emphasis to service provided and suggested some alternative ratios which it believes represent more appropriate improvement factors. Several commenters expressed the belief that daytime-only stations or those causing daytime interference, especially interference involving Class IV stations, should be awarded some preference (E. Harold Munn, NAB, Capital Cities/ABC). Robert A. Jones objected to consideration of existing fulltime stations ahead of daytime-only stations and recommended that any first daytime or nighttime local service be given a preference before others. Cohen, Dippell and Everist oppose our proposal to use the expanded band for interference reduction only. They proposed that Travelers Information Stations (TIS) users be assigned to 1690 and 1700 kHz, an additional two full channels be set aside for educational broadcasters, and, for the remaining channels, existing daytime-only stations should be given priority.

117. **Discussion.** After careful consideration, we believe that revising the priority scheme through an emphasis on stations receiving interference, as opposed to stations causing interference, would be counterproductive because this would stray from our objective in this proceeding - the reduction of congestion and interference in the AM band. Stations that have high nighttime interference-free contours, in most cases, cause the least amount of interference to other existing stations. Shifting priority to daytime-only stations will not reduce the interference situation at night at all. Further, we note that the capacity of the expanded band would only accommodate less than 10% of existing daytime-only stations if it were used solely for that purpose. The intermodulation problem raised by NAB is a receiver deficiency and should be corrected as such. This problem occurs only on certain types of newer digital receivers. No older receivers are affected. Therefore, this problem is entirely one involving receiver design and can be cured by receiver manufacturers.

118. We believe that granting a preference to a station migrating to the expanded band if the station currently provides a community its only local service is not warranted. A first local service preference is, in some contexts, a sensible corollary of our obligations under Section 307(b) of the Communications Act to provide a fair, equitable, and efficient distribution of radio services. For example, where we are faced with a choice between two entirely new stations, such a preference is quite sensible. In the present situation, however, we are not faced with a similar choice, because the local station is already in operation. Therefore, our refusal to grant such a preference does not foreclose the availability of local service in the affected community, nor would grant of the preference in any way improve the distribution of stations.

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[48]See, for examples, comments of Great Empire Broadcasting, Inc. at 19 to 20; Lahm Suffa & Cavell, Inc. at 7; and duTreil, Lundin & Rackley, Inc. at 14.

119. In regard to making a specific allocation to TIS on 1690 and 1700 khz, this step would impair the expanded band's ability to accommodate preferred migrators. Minimizing interference to primary stations and providing maximum site selection flexibility for TIS are best achieved by opening the entire AM band to TIS. See paragraphs 191 to 200.

120. We continue to believe that fulltime stations, that would reduce interference and congestion by moving to the expanded band, represent the most beneficial migrators and that comparing improvement factors is an appropriate basis for selecting between petitioners that desire to migrate. (See paragraph 125). In this fashion, the petitioner that brings the greatest relief from interference and congestion will be selected. Commenters have suggested that those stations with the greatest interference rights have little incentive to migrate. However, because of the voluntary nature of this process, even if the amount of interference reduced is smaller than we could in theory remedy in this proceeding, the reductions that do occur assure that migration would be nonetheless beneficial.

121. We also find the comments supporting a daytime improvement factor sufficiently persuasive for us to alter our initial approach to some extent. We are adopting a revised improvement factor scheme which incorporates a preference factor for daytime interference in addition to the proposed factor for nighttime interference. In recognition of the importance of reducing daytime interference, we are adopting the same approach for calculating the daytime improvement factor that we proposed in the Notice for the nighttime, that is, the ratio of the area of daytime interference caused (co-channel and adjacent channel) to the area of daytime service provided. This method is a logical extension of the nighttime interference factor.

122. However, where nighttime interference and service is determined using the Root-Sum-Square (RSS) method, the calculation of daytime groundwave interference and service is based on the amount of contour overlap adjusted for contour protection ratios. That is, if the normally protected contour of one station is overlapped by the interfering signal of another station on the same or first adjacent channel, the amount of interference caused is equal to that portion of the overlapping area in which the ratio of the desired signal to the undesired (interfering) signal is less than the co-channel or first adjacent channel protection ratio, as appropriate. The daytime service area of a station is equal to the area within its normally protected contour less any area lost to interference as determined above. We will not consider the effects of stations operating on second and third adjacent channels both because the rules regulating second and third adjacent channel spacings permit such stations to operate close to each other (well inside the normally protected contours) and because such rules are intended to control receiver cross-modulation and inter-modulation problems and do not lend themselves to determinations of areas of interference.

123. In calculating the daytime contours, theoretical conductivity values will be used for the purpose of determining the daytime improvement factor. Although it would be possible to use measured conductivity data in connection with the contour calculations for the improvement factor, we conclude that the benefits of this approach would be very minimal. In order to use such data fairly, a complete search of all available measurement data for all

stations would be necessary. Even with all measured conductivity values considered, we believe that, with few exceptions, the effect of the measurement data would even out and there would be little overall impact on the ultimate ranking of prospective migrators.

124. The improvement factors for daytime and nighttime are defined as the ratio of daytime and nighttime interference caused to the amount of daytime and nighttime service that the station provides.[49] Each improvement factor will be calculated independently and then, both improvement factors for the daytime and nighttime will be added together, thus giving equal weight to each factor. Given that interference tends to be greater at night and interference-free service areas are greater in the daytime, the improvement factors will still tend to favor reductions in nighttime interference.

125. To summarize, if no fulltime station requests an allotment in a given area, the next priority will go to daytime-only stations. Daytime-only stations located within the 0.5 mV/m-50% skywave contours of Class I stations and which are licensed to serve communities of 100,000 or more that currently lack a local fulltime aural service will be considered first priority among daytime-only facilities. This will give us the opportunity to make a fulltime allotment to several medium size cities in or adjacent to major metropolitan markets that now lack a local fulltime aural station and have no reasonable prospects for obtaining one. See Notice at paragraph 78. The next priority will go to other daytime-only stations, consistent with the improvement factor calculation methodology described above that ranks stations according to which ones cause the most daytime interference in relation to the service provided.[50] As discussed in more detail in the AM Stereo section, stations within each priority group that propose to broadcast in AM stereo will be awarded a preference. See paragraphs 184 to 190.

D. Allotment or Assignment Options.

126. **Background/Proposal.** There are two planning methods under consideration for the development of the expanded band: allotment planning or assignment planning. Assignment planning would enable us to maximize the number of stations on each channel. Such a method would require each applicant to choose a specific site and custom design the station's technical parameters such as frequency, power and antenna systems to protect other

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[49]For the purpose of determining the nighttime interference free contour when calculating the improvement factor, the RSS 0% exclusion method, including first adjacent channel contributions, will be utilized.

[50]Because our goal is a reduction of interference in the existing band, we find no compelling reason to consider daytime-only stations that have improvement factors equal to zero to be eligible to migrate to the expanded band. In addition, no consideration will be given to nighttime interference reduction for Class II-S and Class III-S stations when determining their improvement factors.

assignments. By contrast, allotment planning requires the Commission to perform the initial planning by specifying, for each allotment, an area within which a station on a given channel may be established with generally fixed technical parameters.

127. The Notice proposed to employ the allotment approach for the expanded band. We recognized that this approach should be implemented in a flexible manner, which may require some variability in inter-allotment separations during the development of the allotment plan to ensure that preferred migrators in areas of concentrated demand may be accommodated to the benefit of the AM service as a whole.

128. **Comments.** Except for several concerns more appropriately addressed in connection with the sample allotment plan, commenters did not specifically address the issue of whether allotment or assignment planning should be used.

129. **Discussion.** While it is true that assignment planning employing individualized parameters and advance knowledge of transmitting sites would enable us to maximize the number of migrating stations, we find that an allotment plan will be more likely to produce the high quality service we seek for the expanded band. Furthermore, it is important that the planning method chosen for the expanded band encourages the migration of preferred migrators, in order to realize the maximum degree of AM improvement. Allotment planning will result in simpler broadcast facilities than would be the case with assignment planning, since the use of large and elaborate directional antennas would be minimized. Therefore, we believe that the development of a flexible allotment plan for the expanded band is the best means of initiating service in the new band consistent with our overall AM improvement goals. Such a plan should allow small variations in inter-allotment spacings to permit sufficient flexibility to derive an allotment plan that would satisfy the needs and interests of licensees that desire to migrate and to ensure that the expanded band would be as interference-free as possible. Also, we believe that a site tolerance on the order of 20 km would be desirable to define the allotment area. This approach will enable us to establish Model I service in this new spectrum, while ensuring that the site location requirements of preferred migrators can be accommodated.

E. Sample Allotment Plan.

130. **Background/Proposal.** The Notice envisioned the development of a sample allotment plan based upon letters of intent received from prospective migrators. The purpose of the sample allotment plan was to illustrate the methods that would be used to create the final plan and to receive beneficial comments to guide us in establishing the process for creating the final plan. We proposed to require all allotments in the sample plan to be at least 800 kilometers (497 miles) from the nearest co-channel allotment area, and 200

kilometers (124 miles) from the nearest adjacent channel allotment area, except in Zone 1.[51] In Zone 1, we proposed separations of 400 and 200 kilometers (249 and 124 miles), subject to the provision of adequate protection. Lastly, the Notice described the methodology to be used for development of the allotment plan. The reduced separations for Zone 1 were proposed in anticipation of high demand for channels in this area.

131. **Comments.** Few comments were directed specifically at the proposed sample allotment plan. E. Harold Munn Jr. and Associates expressed concerns that the proposed spacing requirements are unrealistic. Munn also raised practical concerns regarding the FCC's ability to administer an allotment procedure.

132. **Discussion.** The substantial volume of letters of intent received from potential migrators is a clear indication to us that a high level of interest exists in the development of a sample plan for the expanded band. The spacing requirements proposed in the Notice were conceived under the assumption that the demand for expanded band facilities would be substantially greater in Zone 1 than in the rest of the country. Based upon the letters of intent submitted, we find that this is not the case. The distribution of letters of intent from stations located in Zone 1, as compared to stations in other zones, contradicts our previous expectations of disproportionate interest from stations in Zone 1. This level of interest does not appear to warrant the reduced spacing of 400 km proposed in the Notice. Accordingly, we have endeavored to utilize allotment spacing separations appreciably greater than 400 km in Zone 1, and between allotments in Zone 1 and those located elsewhere in the country. Outside Zone 1 we have attempted to achieve spacing separations as close to 800 km as possible, consistent with the station locations requested in the letters of intent and the development of a sensible plan. Regarding commenters' concerns about the impact of allotment plan development on Commission resources, we believe that in the long term, an allotment plan will be simpler to administer than the assignment method and accordingly will be less demanding on resources. While we recognize that allotment planning involves some compromises in spectrum efficiency and channel loading, the benefits gained in interference control and administrative ease outweigh the drawbacks. Finally, it should be noted that there are still some uncertainties to be resolved regarding use of the expanded band in international border areas. Work continues on bilateral negotiations to finalize agreements on this matter. However, parties are advised that the sample allotment plan being presented is subject to possible revisions, particularly in border areas. Since the sample allotment plan is primarily for illustrative purposes, these potential discrepancies are of little consequence.

133. The sample allotment plan we have developed is based upon the voluntary letters of intent filed in response to the Notice. Ranking of all the candidates for the sample allotment plan was performed after identifying the priority group within which the station filing the letter of intent belongs. These groups are: (a) fulltime stations ranked using the

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[51]Zone I is geographically delineated in Figure 1 of Section 73.699 of the Commission's Rules. It is generally east of the Mississippi River and North of Kentucky and North Carolina.

sum of daytime and nighttime ratios of the areas of interference caused to the areas of service provided; (b) daytime stations located within the 0.5 mV/m-50% skywave contours of Class I stations and which are licensed to serve communities of 100,000 or more that currently lack a fulltime aural service; and (c) daytime-only stations ranked according to the ratio of the area of daytime interference caused to the area of daytime service provided. It should be noted that within each group, the stations were ranked using the AM improvement factor i.e. the ratio of the areas of interference caused to the area of service provided as described in paragraph 124.[52] For all improvement factor calculations, both for interference and coverage, 0% exclusion was used for nighttime calculations in order to give the truest measure of improvement. The groups were then merged, creating a single ranked list.

134. After creating the ranked list of letters of intent, the candidates were examined in sequential order, starting with the highest ranked letter of intent and continuing down the list. An attempt was made to allot as many high ranked letters of intent as possible consistent with applicable adjacent channel considerations in the existing band, and expanded band co- and adjacent channel spacing requirements of 800 km and 200 km, respectively. If no allotment could be made due to conflicts that occurred with previously allotted, higher ranked letters of intent, we attempted to reallot the higher ranked candidates to different expanded band frequencies in order to create an available allotment opportunity for the lower ranked station. If this attempt was successful, the developing allotment plan was revised accordingly and the procedure advanced sequentially to the next lower candidate. When a letter of intent could not be given an allotment due to conflicts on all expanded band channels with higher ranked letters of intent that had been previously awarded allotments, and the computer algorithm was unable to produce an alternative scenario satisfying all applicable constraints, the subject letter of intent was not given an allotment. Under these circumstances, the procedure advanced to the next highest ranked letter of intent until all letters of intent had been considered. In no case was a lower ranked letter of intent allowed to eliminate a previously allotted, higher ranked letter of intent from the sample allotment plan. This ensured that the maximum number of high ranking candidates received allotments. The resultant sample allotment plan is attached as Appendix D.

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[52]Because we did not anticipate a preference for AM stereo operation at the time of the Notice, the letters of intent used to develop the sample allotment plan were not required to include information on the candidate's intent to use AM stereo. Accordingly, an AM stereo preference was not incorporated into the sample allotment plan. Additionally, because the Notice did not anticipate the incorporation of a daytime interference component in the ranking of unlimited time stations, time constraints precluded the development of software which would accomplish this task. For this reason, unlimited time stations in the sample plan were ranked only upon the basis of their nighttime interference components as proposed in the Notice. Both the AM stereo preference and the daytime interference component will be utilized in the development of the actual allotment plan.

F. The Selection Process for Migrating Stations.

135. **Background/Proposal.** The Notice proposed to announce a filing window, within which petitions for authority to move to the expanded band could be filed. Unlike our present application process, no showing would be required for the proposed new operation; technical information would address only the petitioner's currently licensed station. All candidates would be required to operate Model I facilities unless restricted by international agreements or special circumstances that warrant variations. Should the Commission rule favorably on the petition, we would specify the frequency to be used and any additional pertinent technical details. To receive an assignment, successful petitioners would then be required to file a complete application on FCC Form 301.

136. **Comments.** The administrative aspects (opening a filing window, petitions, etc.) drew little comment. A few commenters expressed the view that interference gains and losses, for purposes of calculations used in improvement factors, would be better represented by population counts rather than by area comparisons.

137. **Discussion.** We remain convinced that the general approach outlined in the Notice is both a viable and an efficient approach to administering the selection process. Accordingly, we will announce a filing window during which licensees of stations in the existing band may file petitions for exclusive allotments in the expanded band. The allotment is exclusive in the sense that if a petitioner is selected for migration, an allotment will be made to the petitioner's community of license and only that petitioner will be eligible to apply for the corresponding assignment.[53] The petition must include an accurate description of the existing band station (call sign, community of license and operating frequency) seeking to migrate and any additional information necessary to rank the station, such as an intention to use AM stereo.[54] We will develop an official allotment plan using the same method employed to develop the sample allotment plan.

138. We will then publish the official allotment plan after which all petitioners will have thirty (30) days to comment with respect to questions of fact. After the plan becomes final the petitioners selected for migration will be given 60 days in which to file an application for a construction permit. This will be a standard application subject to the usual statutory and regulatory requirements and will be processed accordingly, except that it will

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[53]An allotment is the association of a particular frequency or channel with a specific community. An assignment is an authorization (license) given by the Commission for a party (licensee) to use that frequency or channel under specified conditions. In normal practice allotments and assignments are made at the same time in the AM and non-commercial FM services; in the commercial FM and television services allotments and assignments are made separately and independently.

[54]Paragraphs 184 to 190 describe how AM stereo preferences will be applied.

not be put on an "A" cut-off list for competing applications.

139. As noted above, the amount of interference used in calculating an improvement factor is obtained from the size of the area experiencing the interference and does not take direct account of the population within the area affected. This is consistent with the central theme of this proceeding which seeks to restore the overall integrity of the AM service by bringing stations more into conformity with our basic standards and obtaining a proper balance between daytime and nighttime service areas. We have deliberately refrained from engaging in individualized ad hoc problem solving. We believe this to be the proper approach because it is the AM service as a whole that is foundering and not merely a select group of specific stations.

140. To properly consider population we would also have to take account of alternative services such that interference to a given population with, for instance, 15 other aural services would be weighted differently than a similar sized population having 5 alternative aural services. Assuming this could be done accurately and promptly for hundreds, possibly thousands, of cases, the resulting numbers would leave an impression of significance and importance that obscures the fact that a major portion of any audience is mobile and that the correlation between listeners and census measurements is at best approximate. This issue was addressed by the Commission in 1964 in a proceeding[55] establishing basic principles that have governed the AM service since then.

> "Insofar as concentration on the facts of each individual case must inevitably distort our sense of perspective in viewing the AM allocation picture as a whole, the ad hoc process may, (except in very extraordinary cases), work at cross-purposes to our basic station assignment goals."

141. The commenters have not persuaded us that population should be used instead as a criterion in deciding which actions will best reduce overall congestion and interference. For these reasons we have decided that interference rankings will be based on the size of the area receiving interference.

142. The following summarizes the steps involved in developing the allotment plan:

(a) The Commission will issue a Public Notice announcing a filing window during which AM stations may file a petition for establishment of an allotment in the expanded band. No filing fee will be required for such petitions. After the filing window closes, the Commission will issue a Public Notice (for information purposes) that lists all stations that filed petitions.

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[55]See 45 FCC 1515, paragraph 14.

(b) The Commission will extract relevant data from the petitions and enter the information into the database.

(c) The Commission will rank all petitions in accordance with the priority groups and improvement factors described in the Report and Order.[56] The priority groups are: (1) fulltime stations ranked according to sum of daytime and nighttime improvement ratios of the areas of interference caused to the areas of service provided; (2) daytime stations located within the 0.5mV/m-50% skywave contours of Class I stations and which are licensed to serve communities of 100,000 or more that currently lack a fulltime aural service; (3) daytime-only stations ranked according to the ratio of the area of daytime interference caused to the area of daytime service provided.

(d) Based upon the overall ranking of the petitions performed in step (c), the Commission will produce the Allotment Plan.[57]

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[56]To calculate improvement factors for petitions to migrate to the expanded band, the AM engineering database will be used. Each U.S. station record in the database includes an entry that identifies the station's domestic status on the basis of three possible operational categories - license, construction permit, or application. License records will be used except that the construction permit record will be used in either of the following two cases: (1) when a licensed station also has a construction permit; or (2) when a station is not licensed but has a construction permit. If an existing band station ultimately is allotted an expanded band channel on the basis of an existing band construction permit for which a license application has not been filed with the Commission by the close of the window, the five-year period for simultaneous operation of existing and expanded band stations will not apply and the existing band construction permit will expire at the end of the normal 18 month construction period, with no provision for extension. Pending applications will be excluded from improvement factor calculations.

With respect to the use of foreign records in the AM engineering data base, the following procedures will apply: (1) interference to foreign stations will not be considered; (2) interference to or from stations in Cuba or the Dominican Republic will not be considered; (3) interference from a station in Canada or Mexico that has been notified and accepted under the terms of the applicable bilateral agreement will be considered; and (4) interference from foreign stations not included in (2) and (3) above which the U.S. has accepted under the terms of multilateral agreements will be considered.

[57]Licensed stations and outstanding construction permits on 1580, 1590, and 1600 kHz will be accorded due protection during the development of the 1610-1700 kHz allotment plan. Petitions filed for expanded band allotments may be precluded because of applications on file for facilities on the frequencies 1580, 1590 and 1600 kHz. Each petition will be checked for possible conflict with applications on these frequencies. Applications that have been accepted

(e) The Commission will then issue a Public Notice identifying the stations that are eligible to apply for authorizations associated with specific allotments. Stations not selected for migration will be given thirty (30) days to file for reconsideration of the Commission's action with arguments limited to addressing errors in the selection process.

(f) After the allotment plan has become final and no longer subject to Commission reconsideration, the Commission will enter the allotment into the Commission's AM Engineering Data Base. This entry will include location, frequency, whether or not AM stereo is to be used and other generic technical information with regard to the particular allotment.

(g) Stations selected for migration will be afforded sixty (60) days from the date the allotment notice becomes final in which to file an application for a CP on the allotted channel. The application should be filed on Form 301 and must be accompanied by the normal filing fee for such application.

(h) After acceptance of the application for filing, the Commission will then put the application on a cut-off list. The application will then be subject to petitions to deny but not to competing applications.

(i) After grant of the CP application and construction of the authorized facilities, the permittee will then file a covering license application on FCC Form 302. Licenses for stations in the 1605-1705 kHz band will be issued for a term that is concurrent with the existing license for the operation in the 535-1605 kHz band.

(j) One year after the initial allotment plan has become final (see (f) above), those allotments provided for in the initial allotment plan that have not been authorized (or for which timely applications are not pending) will be deleted from the Commission's data base and the Commission will open a second filing window to allow for petitions by existing stations to migrate to the expanded band.

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and cut-off will also be afforded complete protection rights from any subsequent 1610-1700 kHz allotment. A conflict that occurs between an application on 1580-1600 kHz that has not been formally accepted for filing and a petition for allotment on 1610-1700 kHz that has been selected for an allotment will be considered as a mutually exclusive situation and, upon timely receipt of the application for allotment, will be subject to the hearing process. While we will not restrict the filing of applications for the frequencies 1580, 1590 and 1600 kHz, action on such applications will be deferred until the allotment plan is developed.

(k) Upon completion of the second filing window for petitions to migrate and the subsequent authorization procedures, the Commission will continue to monitor the migration process to assess the potential for adding additional stations to the band. As part of that assessment, the Commission will determine whether additional allotment windows will utilized or whether to implement a traditional assignment scheme to best maximize the remaining available spectrum.

G. Ownership Limitations and Transition Period.

143. **Background/Proposal.** Recognizing the financial uncertainties of operating a new AM station in the expanded band because of an inability to accurately forecast listening patterns, advertising revenues, as well as the future availability and market penetration of wideband receivers, the Notice proposed that some changes be made to our multiple ownership rules in order to facilitate migration to the expanded band. Specifically, the Notice proposed that a note should be added to the multiple ownership rules creating an exception to the duopoly rule that would permit the simultaneous ownership and operation of an expanded band and an existing band station with overlapping 5 mV/m contours for a fixed transition period. After the expiration of the transition period, the license for the existing band station would be surrendered. The Notice also proposed that a licensee would be permitted, without limit, to duplicate on the expanded band channel the programming carried over its existing AM band channel. Also, the Notice proposed to modify the national ownership rule to permit an existing AM licensee to own and operate an expanded band station during the transition period even if this gave the licensee a cognizable ownership interest in excess of the national limits.

144. **Comments.** There was wide support for dual ownership of existing band/expanded band stations during a transition period, after which the existing band license would be surrendered. Those few commenters who specifically addressed the proposal regarding national ownership limitations supported it. Most commenters suggested that the transition period for dual ownership should range anywhere from five to ten years. The NAB supported a five year transition period, after which time the Commission could evaluate the penetration of the full-band receiver market and the status of the popularity and development of the new band. Many other commenters were adamant that flexibility should be the cornerstone of any transition period that may be selected. Some commenters suggested that intervening factors, including the economic viability of stand-alone expanded band facilities and the amount of expanded band receivers available in the marketplace, should be considered in determining whether an extension of the transition period would be warranted. Other commenters felt that no specific time period should be set forth, but rather the transition period should be linked exclusively to a single criterion such as the substantial presence in the marketplace of full-band receivers. For instance, CBS, Inc. suggested linking the transition period to the presence of full-band receivers in at least seventy-five percent of the households and automobiles in the local marketplace. The proposal to allow simulcasting on both bands also received wide support from commenters. Licensees reasoned that by allowing

simulcasting on both bands, they can avoid additional programming costs and take advantage of economies of scale. Commenters were also of the opinion that permitting simulcasting would provide an incentive for broadcasters to migrate to the expanded band.

145. **Discussion.** The favorable comment received on these proposals reinforces our initial conclusion that temporary dual ownership and operational flexibility are essential to a successful transition to the expanded band. We are therefore persuaded that it is appropriate to adopt new ownership rules for the expanded band.

146. Regarding dual ownership and operation, we believe that the initial time frame set for this transition period should be five years. Considering the emphasis placed by commenters on flexibility regarding this issue, we will monitor progress in the use of the expanded band during this period and grant an appropriate extension if factors affecting the overall development of the band warrant such action. These factors would include, among others, the economic viability of stand-alone expanded band stations and the penetration of full-band receivers in the marketplace. An exception will also be made to our national ownership rules allowing our numerical limit to be exceeded during this transitional phase. We emphasize, however, that following construction of the expanded band station, the license that would be issued if all terms of construction were met would be conditioned on the eventual surrender of the existing band license. As outlined in our Notice, during the interim we would prohibit the licensee from operating on one of its authorized frequencies and selling its operation on the other frequency. If a station is authorized to move to the expanded band, and the licensee later decides to operate on only its former frequency, we will require it to surrender its expanded band authorization and its allotment would be deleted. After an expanded band station is licensed to operate and the transition period has expired, the existing band station will go silent. Any applicant seeking the former existing band frequency will not "inherit" the previous station's radiation rights, but will instead have to meet the standards in effect at the time of the filing.

147. We will also permit simulcasting on both bands during the transition period. Not allowing for such duplication privileges would only act as a disincentive to broadcasters considering moving to the new band. It is vital to employ all means available to encourage broadcasters and listeners to utilize the new band. Considering the economic ramifications of such a move, we believe that same-service simulcasting for a transition period will only help in our efforts to encourage development of the new service. Finally, we acknowledge the separately pending Notice of Proposed Rule Making in MM Docket No. 91-140 regarding the possible revision of the radio multiple ownership rules. The notes that will be added to our current multiple ownership rules in order to accommodate the new AM expanded band will be adjusted, if necessary, to reflect any comprehensive changes that may be made to the rules in that proceeding.

148. In this section, we have adopted an appropriate set of rules for the expanded band which are intended to reduce interference in the existing band, while facilitating the prompt initiation of service in the new broadcasting spectrum. In this way we intend to

maximize the benefits to the AM service as a whole due to the migration process. Of course, no improvement can be realized through these actions alone without the recognition by preferred migrators that such a move would be in their own best interests. We have adopted regulations today that will achieve that effect. We stand committed to our objective of creating a model AM service in the expanded band that will ensure that the full potential of AM broadcasting can be realized.

H. Expanded Band Technical Standards.

149. **Background/Proposal.** The technical standards for the expanded band define how the Commission authorizes, and licensees construct, stations in the band. Currently, there are no rules governing AM broadcast use of the 1605-1705 kHz band. Because these frequencies are adjacent to the existing AM band (535-1605 kHz), a vast body of relevant information concerning technical operation on adjacent spectrum is available.

150. The Notice proposed that the technical standards applying to the existing AM band apply generally to operations in the expanded band. These standards include minimum antenna efficiency and ground system requirements, antenna radiation characteristics, and blanketing restrictions.

151. **Comments.** The commenters generally do not disagree with our proposals. In one of the few comments that specifically addressed this issue, du Treil, Lundin and Rackley proposed to eliminate the requirement for minimum antenna efficiency, as long as the radiation characteristics can reasonably be established.

152. **Discussion.** We remain convinced that our initial proposals will best serve our defined goals and we will therefore adopt them in toto. By this action, we establish for use in the new spectrum, fundamental technical operating criteria that have been applied to AM broadcasting for many years. Use of such criteria links the existing and expanded bands by applying uniform and basic station operational characteristics and provides a known basis for developing the expanded band so as to achieve a significant degree of improvement of the AM service. With respect to antenna efficiency, our view is that unless minimum efficiency standards are set for the expanded band, the frequency resource will be inefficiently used. Moreover, we are of the view that minimum antenna efficiency requirements, including use of at least a quarter wave ground system, ensures that relatively large service areas will be established, and that Model I service objectives may be achieved.[58] Similarly, reasonable assumptions must be made regarding antenna losses, in order to accurately calculate directional antenna patterns.

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[58]For a more complete description of the technical characteristics of a Model I station, see paragraphs 101 to 107.

I. City Coverage for Expanded Band Stations.

153. **Background/Proposal.** City coverage requirements define the minimum coverage a proposed facility must provide, day and night. In the existing band, during the day a 5 mV/m signal is required at all locations within the station's community of license; at night, a station's interference-free contour using the current RSS method must encompass the community of license. We routinely consider nighttime coverage of at least 80% as substantial compliance with the community of license coverage requirement.

154. The Notice proposed that stations in the expanded band be required to provide nighttime coverage of 50% of the principal community by the 5 mV/m or the interference-free contour, whichever is greater. Nighttime coverage would be calculated using the RSS method without exclusion. Comment was also sought on the option of allowing 50% coverage on a temporary basis and ultimately returning to the 100/80% coverage standard.

155. **Comments.** While few commenters addressed this issue, most doing so opposed the proposal to reduce city coverage requirements. Cap Cities proposed that 100% of a station's community of license should be served within the station's 5 mV/m contour and suburbs should be served within the station's 2 mV/m contour. Sellmeyer Engineering and CDE opposed a 50% coverage standard, the former saying it would create another group of substandard stations.

156. In support of the Notice proposal, E. Harold Munn stated that the proposal to permit 50% city coverage is consistent with recent Commission decisions regarding coverage. He considers it essential to establish a different level of coverage now that we have proposed a different way to calculate coverage using the RSS without exclusion, and would support the 50% level. He further considers it to be inappropriate to return to the existing 100/80% standard at a later date, an option on which we requested comment.

157. **Discussion.** Since we believe that AM improvement will be accomplished only if facility changes which move the AM service in the direction of the adopted models are granted, resolution of this issue essentially requires the Commission, when determining whether to grant an application for migration to the expanded band, to balance the qualitative improvement of the AM service against the current minimum extent of service. Since signals propagate somewhat less efficiently at expanded band frequencies than in the existing band and close-in sites suitable for AM antennas are increasingly difficult (and expensive) to find, we have raised the possibility of relaxing coverage requirements to facilitate the relocation of preferred migrators.

158. Regarding those commenters urging that more than 50% coverage of the city be required, we note that this position does not address the desirability of facilitating preferred migrators, which was the basis for the coverage relaxation proposed. Furthermore, the limitations imposed on expanded band facilities (power limits, poorer propagation at higher frequencies) may make it difficult for migrating stations to serve their communities from

existing sites. We do not believe a 50% coverage requirement results in substandard stations. While less rigorous than our present standard, the 50% requirement nonetheless insures a signal of significant quality to the community of license and the added flexibility of a 50% coverage rule allows the maximum latitude consistent with the goals of community service, for stations to locate expanded band facilities at cost effective locations.

V. Consolidation

159. In order to achieve our goal of interference reduction in the existing AM band, the Notice sought comment on proposed changes to our non-technical policies and rules intended to motivate broadcasters to reduce interference in the band. Specifically, the proposed changes included: (1) granting tax certificates to AM licensees who receive monetary compensation from another licensee to surrender a broadcast license or to modify an existing facility if those acts resulted in interference reduction; (2) relaxing our multiple ownership rules to permit a licensee significantly reducing interference to co-channel or adjacent channel stations to own AM stations whose 5 mV/m contours overlap; and (3) possibly reimposing an AM-FM program nonduplication rule.

A. Voluntary Agreements.

160. **Background/Proposal.** Section 1071 of the Internal Revenue Code, 26 U.S.C. §1071, permits the Commission to issue a tax certificate to the seller of a regulated property when the sale will give effect to a new or changed Commission policy regarding the ownership or control of broadcast stations. Section 1071 reads, in pertinent part, as follows:

> If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033.

161. A tax certificate enables the seller of the broadcast property to defer any capital gain it realizes by acquiring qualified replacement property within two years of the sale or by reducing the basis of other depreciable property. See 26 U.S.C. §1033. We have used tax certificates to encourage voluntary divestitures of grandfathered ownership interests inconsistent with changes in our multiple ownership rules and broadcast sales to minorities. In the Notice, we stated that voluntary agreements among AM licensees under which one licensee financially compensates another AM licensee to either surrender its license or modify its facilities could significantly improve the overall quality of AM reception by reducing interference and congestion in the AM band. It is now our policy to encourage such agreements. In furtherance of this policy, we have revised our Rules with respect to

contingent applications and competing applications. See Policies to Encourage Interference Reduction Between AM Broadcast Stations, 5 FCC Rcd 4492 (1990). In the Notice, we proposed issuing tax certificates as an additional means of encouraging such agreements. The Notice specifically requested comment on whether an agreement to surrender a license for cancellation is a sale or exchange under Section 1071 of the Internal Revenue Code. We specifically sought comments on several related matters concerning the issuance of tax certificates. These matters included:

(a) whether the use of tax certificates in this case would be consistent with our past use of this tool;

(b) what are the tax implications of voluntary license surrender agreements, i.e. how could they be structured to constitute a sale of property under 26 U.S.C. §1071;

(c) whether we should require a showing that interference will be reduced by some prescribed amount as a prerequisite to our issuing the certificate; and,

(d) when that certificate should be issued.

162. **Comments.** The comments supported the proposal of issuing tax certificates to AM licensees taking steps to reduce AM interference.[59] However, several parties, including the NAB, stated that these tax certificates may have little utility due to the declining value of many AM stations. As such, there may be no gain to defer. Nevertheless, there are circumstances where a gain may be realized either from surrendering an AM license for cancellation or modifying an existing AM facility to reduce interference.[60] The NAB expressed concern that the IRS may take the position that a surrender of an AM license to the Commission is not a "sale or exchange" because the surrendering AM licensee does not transfer anything to the other AM licensee.

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[59]The engineering consulting firm of duTreil, Lundin & Rackley, Inc. ("duTreil) expresses its belief that existing AM and FM stations will eventually be given a preference in the assignment of new digital audio broadcasting (DAB) channels. According to duTreil, this possibility may make AM licensees reluctant to enter into interference reduction agreements looking toward the surrender of their licenses. Therefore, duTreil urges that we consider giving every AM licensee that surrenders its license the same DAB preference that it would have received had it remained on the air. Whether or not existing broadcast stations will receive a preference with respect to DAB channels is outside the scope of this proceeding.

[60]These situations may involve long-held AM stations originally purchased at substantially lower market prices or AM stations with a significant amount of appreciated real estate.

163. **Discussion.** At the outset, we again emphasize that tax certificates are issued pursuant to Section 1071 of the Internal Revenue Code. These tax certificates involve both the Commission and the Internal Revenue Service ("IRS"). Our responsibility in this regard is to determine whether the "sale or exchange of property" effectuates a new Commission policy. As a result of this proceeding, we adopt a new policy to discourage ownership interests in AM stations causing interference and to encourage existing licensees to enter into voluntary agreements to reduce such interference. It is our view that improvement in the technical quality of the AM service will promote the public interest objective of an overall competitive radio broadcasting service. Cf. Telecator Network of America, 58 RR 2d 1443 (1985). To that end, we will issue tax certificates to AM licensees receiving financial compensation for surrendering their licenses for cancellation.[61] In this proceeding, it is also our policy to encourage parties to enter promptly into such interference reduction agreements. For this reason, we will only issue these tax certificates in response to agreements filed within three (3) years of the effective date of this Report and Order. We consider such transactions "necessary and appropriate to effectuate" our new policy of encouraging the reduction of interference in the AM band. We note, however, that the IRS makes the ultimate determination whether the statutory requirement of a "sale or exchange of property" has been met.[62] We will grant tax certificates in the circumstances described above, subject to IRS approval regarding the "sale or exchange of property" determination.[63]

164. The Notice also proposed issuing tax certificates to those licensees that modify their facilities to reduce interference. While we continue to encourage such voluntary agreements, we believe the issuance of tax certificates in such situations to be legally problematic as regards the statutory requirement of a "sale or exchange". We will, therefore, limit the issuance of tax certificates to situations involving a surrender of a license.

B. Common Ownership.

165. **Background/Proposal.** Reduction of interference to stations in the existing AM

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[61]We would issue the tax certificate upon the surrendering of the AM license for cancellation.

[62]We note that a transaction involving the sale of a station and surrender of its license has traditionally been construed to involve a "sale or exchange of property" within the meaning of Section 1071. See Policy Statement on Issuance of Tax Certificates, 92 FCC 2d 170 (1982). We also think a reasonable argument can be made that an agreement to surrender a license in exchange for payment can be viewed as a sale or exchange within the meaning of 1071.

[63]The NAB also addresses the issue of the reinvestment of the financial compensation into technical equipment to be used at a broadcast station and whether such an expenditure would qualify for nonrecognition as qualifying replacement property. Whether or not this expenditure meets the "property similar or related in service or use" requirement set forth in Section 1033 of the Internal Revenue Code is within the purview of the IRS and outside the scope of this proceeding.

band is an important goal in this proceeding. One approach to achieving this goal involves the relaxation of some Commission non-technical policies and rules which would ideally have the effect of motivating broadcasters to reduce interference in the band. One non-technical method proposed in the Notice to accomplish this goal was to waive Section 73.3555(a)(1) of our rules -- the AM duopoly or contour overlap rule -- on a case-by-case basis, to permit common ownership of two commercial AM stations with overlapping 5 mV/m contours if an applicant showed that a significant reduction in interference to adjacent or co-channel stations would accompany that common ownership. Simultaneous broadcasting of the same program on both stations would be permitted if the stations served substantially different markets or communities. In order to ensure that the promised interference reduction would result from the joint ownership, we proposed to require applicants to submit, along with their waiver requests, contingent applications for the major or minor facilities change needed to achieve the necessary interference reduction.

166. **Comments.** The common ownership proposal for the existing band generally found wide support among the commenters. Commenters generally agreed that changes in the economy, in technology, and in the number of media outlets have considerably lessened the ability of AM stations to dominate the marketplace, and that, therefore, concerns about undue media concentration resulting from common AM ownership have considerably diminished. Similarly, most commenters argued that significant gains could be made if licensees were permitted, in some instances, to operate co-located AM facilities. Comments submitted by the NAB are representative of the majority of positive comments received regarding this proposal. The NAB argued that the result of common AM ownership and operation is that broadcast operations will become more economically efficient through economies of scale as well as salary and capital expenditures savings. According to the NAB, the public would also benefit by common ownership and operation because licensees could devote more resources to areas such as news and public affairs programming. Those commenters opposing grant of the interference reduction waivers argued that such common AM ownership would result in lack of viewpoint diversity and encourage marketplace concentration.

167. Generally, most commenters, including the NAB and CBS, Inc., agreed that a "significant" amount of interference reduction be required in order to get a waiver grant. Most also stated that no prescribed amount should be imposed because that prescribed amount would be an arbitrary figure. On the other hand, Greater Media, Inc. did suggest that a reduction of at least 20% in interference, based on the number of square kilometers of contour overlap, should be the threshold for consideration for such a waiver. Greater Media also argued for excluding from consideration factors that might affect diversity or market concentration when determining the merits of a waiver request. Other commenters made the suggestion that in addition to interference reduction waivers, the Commission should also consider waivers of the duopoly rule if that would result in economic benefits to financially struggling stations, even if interference reduction is not achieved.

168. Most commenters did not specifically address the simulcasting issue raised in the context of the common ownership proposal. It would appear from the lack of response

received that there was no disagreement with our proposal to allow simultaneous broadcasting of the same program on commonly owned AM stations if the stations served substantially different markets or communities.

169. **Discussion.** After careful review of the comments, we continue to believe that a balanced case-by-case waiver approach to allowing common ownership in exchange for interference reduction in the existing band is best suited for our purposes. We therefore adopt the proposal made in the Notice limiting grant of waiver requests to those situations that result in interference reduction to co-channel or adjacent channel stations. In making our waiver decisions, however, we will remain mindful of viewpoint diversity and market concentration and will consider these factors in conjunction with what will be accomplished by an interference reduction proposal. We will require to be filed, along with waiver requests, contingent applications for major or minor facilities changes demonstrating the nature of the interference reduction to be accomplished. In view of the potentially wide range of factual circumstances in which beneficial interference reduction may occur, we decline to adopt a benchmark which a proposal must meet to be considered as one resulting in "significant" interference reduction. However, we will be guided by factors such as those enunciated in our migration selection processes in determining whether a reduction is "significant". Simulcasting on these commonly owned stations will be permitted if the stations serve substantially different markets or communities.

170. Since the radio multiple ownership rules may be modified pursuant to the separately pending Notice of Proposed Rule Making in MM Docket No. 91-140, we acknowledge that a future rule revision may allow for commonly owned AM stations without any demonstration of interference reduction. At this juncture, however, our goal is to improve the overall state of the AM service and to offer incentives to aid in attaining this goal within the parameters of this rule making. Any adjustment or expansion to our limited multiple ownership rule changes in this proceeding will be coordinated with any overall future changes that may be implemented with regard to these rules.

C. AM-FM Programming Nonduplication Rule.

171. **Background/Proposal.** AM-FM program duplication, or simulcasting, refers to the simultaneous broadcasting of a particular program over co-owned AM and FM stations serving the same market, or the broadcasting of a particular program by one station within 24 hours before or after the identical program is broadcast over the other station. Before 1964, there were no program duplication limits on co-owned AM and FM stations serving the same market. In that year, the Commission adopted program duplication rules limiting FM stations to duplication of no more than 50% of their programming from a co-owned AM station serving the same local area. By this rule, the Commission sought to further two goals. First, the Commission sought to foster the development of the FM service by encouraging the public to purchase and use FM receivers. This, the Commission believed, was best achieved by the development of separate programming on the AM and FM bands. Second, the Commission sought to reduce what it perceived as inefficient use of the spectrum resulting

from duplication of the same programming on two stations serving essentially the same audience.

172. Ten years later, taking note of the tremendous growth of the FM service, the Commission initiated a proceeding to revisit the question of program duplication. In that proceeding, the Commission further limited AM-FM program duplication. The rule adopted therein permitted not more than 25% duplication if either station served a community with a population of more than 25,000.[64]

173. In 1986, the Commission deleted the program duplication rule. The Commission cited three reasons for this action. First, the FM service had developed to the point that FM stations were fully competitive. The Commission therefore did not find it necessary to continue to foster the growth of FM through a separate programming requirement. Second, elimination of the rule was not expected to result in inefficient use of spectrum. Rather, it was expected to result in increased hours of operation for those stations that had shortened their broadcast day as a means to comply with the rule. Third, elimination of the rule was thought to provide licensees of AM-FM combinations maximum flexibility to respond to economic conditions facing the AM service. That is, elimination of the rule would allow licensees to reduce operating costs for marginal AM stations.

174. In the Notice, we sought general comment on three questions regarding whether the Commission should impose limits on AM-FM program duplication. We recognized that duplication may be effective in assisting a fledgling or financially weak AM station stay on the air, but noted that the usefulness of program duplication may be limited. Stating that we are unaware of any instances where use of duplication actually reversed a decline in audience share or served to establish a permanent economic base, we first asked that commenters address themselves to the efficacy of program duplication as one means of helping marginal stations stay on the air. Second, we asked commenters to consider the preclusive effect that the existence of an AM station has on the use of adjacent channels and the limits a station places on the ability of other licensees to modify or improve their facilities and to comment on whether these considerations outweigh the policy articulated in MM Docket No. 85-357. Third, we requested comment on whether program duplication would assist or obstruct attainment of our overall objective to revitalize the AM service by the year 2000.

175. **Comments.** The comments are divided on the question of reimposing some form of AM-FM programming non-duplication. Generally, commenters who would have the Commission prohibit program duplication argue that such a rule would lead to a more efficient use of spectrum and would increase program diversity. Commenters who oppose limiting program duplication also believe that the policy they support increases program diversity. In addition, these commenters feel that programming duplication is the only means by which many marginal AM stations can survive.

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[64] Report and Order in Docket No. 20016, 59 FCC 2d 147 (1976).

176. Several commenters, including Group W, Alabama Native and Great Empire support a rule that would limit program duplication. Group W believes that program duplication is a detriment to the AM service with little offsetting benefit. Group W submits that stations airing duplicated programming generate interference to other AM stations yet provide little service to the public. Group W believes that a rule eliminating simulcasting will encourage the elimination of marginal AM stations and thereby reduce the overall interference in the AM band. Alabama Native is more adamant in its support of a rule eliminating AM-FM program duplication. Alabama Native states unequivocally that any AM station that must simulcast in order to keep from "going under" should go under. Alabama Native submits that it is not in the public interest to permit duplication of FM programming on AM stations, and believes that such duplication is a waste of spectrum. Alabama Native requests that the Commission take a firm stance on the issue and prohibit any duplication. In Alabama Native's view, the result of such a rule would be to revitalize AM broadcasting by reducing interference and allowing expanded local service by those AM broadcasters seeking to serve the public with nonduplicative programming. Also, as indicated in the Notice (at footnote 34), we have included as part of the record in this docket, the petition for rule making filed in 1989 by Earl J. Weinreb. Mr. Weinreb requests that the Commission reimpose an AM-FM nonduplication rule arguing that many marginal AM stations remain on the air only by simulcasting a co-owned FM thereby denying others the opportunity to present original programming.

177. CBS, NAB and several other commenters support allowing program duplication. CBS and NAB argue that licensees should be afforded maximum flexibility to respond to current difficulties created by the economic and technical decline of the AM service. In addition, these parties argue that the Commission properly eliminated program duplication rules in 1986 based on the effectiveness of the market in limiting duplicative programming. According to these parties, the real effect of a rule limiting duplication would be to deprive AM broadcasters of a means to contend with current market problems in the relatively few instances where use of such programming would be of immediate benefit.

178. **Discussion.** The record in this proceeding raises significant questions about the public interest benefits that are said to flow from our current policy of permitting AM-FM combinations to duplicate as much programming as they desire on two stations serving the same community. In this regard, we note that some commenters have argued that program duplication on many AM-FM combinations is a waste of spectrum. As these commenters observe, the service areas of most combinations are largely equivalent because both stations are licensed to the same community and have similar coverage requirements. In these instances, it can be argued that the listening public receives little benefit from program duplication and, in fact, is deprived of the opportunity to hear a different voice in the community.

179. It should also be noted that the cost to the public in terms of diversity may not be limited to the particular station at issue. As we stated in the Notice, when a channel is licensed to a particular community, others are prevented from using that channel and six

adjacent channels at varying distances of up to hundreds of kilometers. Accordingly, where an AM station duplicates the programming of an FM station with a substantially equivalent coverage area, it appears that the limited amount of spectrum available could be used more efficiently by other parties to improve service and diversity.

180. We are sympathetic, of course, to the arguments of some commenters that a rule limiting program duplication by AM-FM combinations could make it more difficult for some AM stations to survive in the current economic climate.[65] In this regard, we recognize that we do not have complete information with respect to the number of AM stations that might be adversely affected by a program duplication restriction. The comments in this proceeding provided examples of how program duplication is helpful in supporting specific AM stations. For instance, one commenter described its success in using duplicative programming to support an expanded schedule of specialized programming on its AM station. In addition, commenters provided several specific examples in which the use of program duplication is said to be the linchpin to the viability of an AM station. The NAB also submitted data regarding the economic efficiencies that generally result from the use of program duplication.

181. We generally believe that encouraging separate programming by AM-FM combinations would effectively serve both our interest in promoting diversity and our objective of reducing interference and congestion in the AM service. In particular, we believe that it may be appropriate to restrict AM-FM combinations serving substantially the same commmunity[66] from duplicating more than a set amount (e.g., 25%) of programming. This approach would give AM-FM combinations the flexibility to simulcast some portion of their programming, while also helping to ensure that the radio spectrum in a given community is used in an efficient manner that promotes an optimum AM service.

182. We recognize, however, that conditions in the AM band may change substantially during the next few years. Indeed, the decisions we implement in this proceeding are intended to precipitate such change. As the AM service responds to our actions and new developments in the industry unfold, many stations may face different economic situations. Under these dynamic conditions -- and in view of the somewhat uncertain information we currently possess concerning the overall impact that new program duplication limits may have on the AM service -- we conclude that adopting such restraints at

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[65]It could also be argued that, in the event some AM stations were forced to go dark in the face of such restrictions, other existing stations might be able to improve their service, since the preclusionary effect of the defunct station would be eliminated. Similarly, a decrease in the number of marginal AM stations could have the beneficial effect of reducing overall interference in the AM band.

[66]Defined as where more than 50% of the nighttime service area of one station is overlapped by the nighttime service area of the other station.

this time would be premature. Accordingly, we will revisit this issue at the end of three years to determine whether, informed by a more certain knowledge of the direction of the AM service, program duplication limitations are advisable.

183. In summary, we believe that the changes to our rules and policies that we have adopted in the non-technical areas will serve to enhance the existing AM service through the achievement of overall interference reduction in the band. Likewise, our decision to revisit the issue of imposing a program nonduplication requirement in three years will enable us to assess the impact of the decisions we make today on the AM service and better evaluate the need for program duplication limits. Moreover, adoption of changes such as the encouragement of voluntary arrangements to reduce interference through the issuance of tax certificates and the relaxation of our multiple ownership rules for those who can demonstrate significant reduction of interference to other AM stations, will help reshape the service and foster long-term benefits so that it can reach its maximum potential.

VI. AM Stereo

184. **Background/Proposal.** For several years, AM stereo has been offered as a partial solution to the problems confronting the AM broadcast service. In the Notice, we proposed that both Model I and Model II stations would utilize stereo modulation and sought comment as to what decisions regarding stereo would be useful in this proceeding.

185. **Comments.** Many commenters opposed a requirement for mandatory provision of AM stereo service, preferring instead the present voluntary system. Most cited economic considerations as their reason for opposing the mandatory requirement.

186. **Discussion.** The reasons advanced by those opposing a mandatory AM stereo requirement have convinced us that the provision of AM stereo in the existing band should remain a voluntary decision. Arguments of economic hardship are very persuasive for stations remaining in the existing band, since many of these stations are already in precarious financial situations and cannot afford the cost of converting their facilities to stereo operation.

187. However, in the case of AM stations that are migrating to the expanded band, we believe that there is a compelling reason to provide an incentive for the use of AM stereo. In our view, AM stereo is a valuable asset. Our objective is to create an environment that is competitive with other sources of audio entertainment. Failure to encourage use of AM stereo would send a signal to receiver manufacturers and the public that we are less than completely committed to the provision of a fully competitive service in the expanded band. Additionally, AM stereo operations in the expanded band would provide receiver manufacturers with an added incentive to produce receivers capable of stereo reception for the entire AM band. Accordingly, while we encourage stereo operation in the existing band, we will provide a specific preference for stereo proponents in the expanded band. The incremental expense associated with the provision of AM stereo in a new facility is typically

less than the cost of converting an old facility and represents only a small percentage of the total cost of building a new AM station.

188. The use of AM stereo will enhance the competitiveness of stations in the expanded band by providing the highest audio fidelity available through use of state-of-the-art AM equipment. To encourage migrating stations to acquire this technology at the start, we will provide migration preferences for those existing band stations which, when filing petitions for expanded band allotments, express their commitment to use of AM stereo for their proposed expanded band operation. Under this approach we will favor a migrator who proposes stereo over one who does not where the difference in their improvement factors is not sufficient to outweigh the benefits of stereo operation.

189. We will apply the stereo preference in this manner. As explained in paragraphs 135 to 142, petitions for allotments of expanded band channels submitted by existing stations will be arranged in each priority group in order of the improvement factor calculated for each petitioner. Allotments will be made one-by-one beginning with the highest improvement factor. During this process, we may find that an allotment under consideration (candidate allotment) is mutually exclusive with one or more previously selected allotments (established allotments) and cannot be accommodated in the expanded band. We will substitute the candidate allotment for a previously established allotment provided all of the following conditions are met:

(1) The petitioner for the candidate allotment has made a written commitment to the use of AM stereo and the petitioner for the established allotment has not;

(2) The difference between the improvement factors associated with the candidate and established allotments does not exceed 10% of the improvement factor of the candidate allotment;

(3) The substitution will not require the displacement of more than one established allotment; and

(4) Both the candidate allotment and the established allotment are within the same priority group (e.g., fulltime stations).

190. The 10% differential was chosen to avoid the possibility of an egregious outcome. That is, we would not want a low ranking candidate allotment to replace a much higher ranking established allotment that offered the prospect of a significant reduction in interference and congestion. Such a result would run contrary to the priorities we have articulated in this Report and Order by assigning more weight to stereo than to improvements in interference and congestion. At the same time we anticipate that at the middle and lower levels in each priority group the improvement factors of adjacent and nearby candidate allotments will be fairly close in value. The 10% differential will be sufficient to give a

meaningful preference for stereo.

VII. Travelers Information Stations

191. **Background/Proposal.** Travelers Information Stations (TIS) are low power[67] AM stations authorized in the Local Government Radio Service[68]. Currently they are authorized to operate on either 530 kHz or 1610 kHz on a secondary, non-interference basis to regular AM broadcast stations. Programming may consist only of noncommercial voice information pertaining to traffic and road conditions, traffic hazard and travel advisories, directions, availability of lodging, rest stops and service stations, and descriptions of local points of interest. Several states rely heavily on TIS to advise the motoring public about traffic conditions. Thus, they clearly serve the public interest. They may even have some value to AM broadcasters in that they may attract motorists to the AM band. Nevertheless, because the current TIS frequency of 1610 kHz comprises 10% of the expanded AM band, a decision is necessary on whether TIS should continue to be authorized on 1610 kHz (or some other expanded band frequency) or whether some alternative course of action would be more appropriate.

192. The Notice argued that allocating any expanded band frequency to TIS on a primary basis appeared unjustified in view of the consequent 10% reduction in spectrum available for alleviating congestion in the lower AM band. However, it proposed to permit TIS operation on any of the ten expanded band channels from 1610 kHz through 1700 kHz on a secondary, non-interference basis. Thus, TIS operation on 1610 kHz could continue until a primary station assignment was made that would be adversely affected by the TIS. We solicited comment on whether the TIS licensee should pay the costs of a frequency change or relocation on the basis of either actual or predicted interference to the primary AM station, or whether the licensee of the primary AM station should be responsible for such costs. We also sought comment on whether TIS stations should be authorized in the existing

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[67]The transmitter output power of a TIS using a conventional vertical antenna is limited to 10 watts. Moreover such an antenna may not exceed 15 meters (49.2 feet) in height. Alternatively, a TIS may use a "leaky" coaxial cable up to 3 km (1.9 miles) in length as an antenna. In such a case, the transmitter power is adjusted so that the field strength 60 meters (197 feet) from the cable does not exceed 2 mV/m. This corresponds to a transmitter output power of 50 watts or less.

[68]The Local Government Radio Service is one of the private land mobile radio services authorized pursuant to Part 90 of the Commission's Rules. Eligibility for operation is limited to state and local governments or various subdivisions thereof. However, stations similar to TIS may be operated by commercial entities under Part 15 of the Commission's Rules. These Part 15 stations are usually of the "leaky" coaxial cable variety and are subject to more restrictive radiation limits than TIS stations.

AM band (535-1605 kHz). Lastly, we sought comment on whether any changes in the technical assignment standards for TIS were necessary in view of probable changes being made in the standards for primary AM stations.

193. **Comments.** The commenters on the TIS issue fall into three categories: broadcasters, broadcast consulting engineers and TIS interests. Broadcasters[69] supported TIS operation in the expanded band on a strictly secondary basis, with TIS licensees bearing the cost of any necessary frequency changes or station relocations.[70] The consulting engineers, with one exception,[71] argued that TIS operation on any frequency between 535 and 1705 kHz should be on a secondary basis. TIS interests,[72] including TIS operators and the National Telecommunications and Information Administration (NTIA), favored a primary TIS allocation on 1700 kHz,[73] as well as secondary TIS operation on frequencies between 535 kHz and 1695 kHz.[74]

194. NTIA stated that the proposals in the Notice would jeopardize the ability of TIS to provide 24-hour service, since, in their view, operation on a secondary basis would be

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[69]The term "broadcasters" is used loosely to signify broadcast licensees and their interests. TIS-related comments were filed by the National Association of Broadcasting, the Spanish Radio Network, Westinghouse Broadcasting, Michiana Telecasting Corp., Greater Media, Inc. and Great Empire Broadcasting.

[70]As explained in the text, supra, there is a good probability that some TIS stations operating on 1610 kHz will be displaced as a result of a primary station assignment being made on that frequency. However, TIS operation on other frequencies could be subject to the same displacement, although the risk would be lower in the existing band (535-1605 kHz) where AM service has fully matured and is likely to remain more static. None of the TIS interests argued that broadcasters should bear the costs of changes in TIS facilities necessitated by primary station authorizations, although the California Department of Transportation argued that actual, rather than predicted, interference should occur before such changes are required.

[71]Cohen, Dippel and Everist, P.C. recommended that two channels be set aside for TIS in the expanded band.

[72]TIS interests filing comments were the American Association of State Highway and Transportation Officials (AASHTO), the National Telecommunications and Information Administration (NTIA), the Port Authority of New York and New Jersey, the Maryland Department of Transportation, the California Department of Transportation, the City of Port Angeles and Information Station Specialists.

[73]The Maryland Department of Transportation also favored a primary TIS allocation on 530 kHz and on either 1690 kHz or 1710 kHz.

[74]AASHTO, with the Spanish Radio Network, also proposed TIS operation in the FM band.

appropriate only for providing daytime service with nighttime service rendered unreliable due to skywave interference from AM broadcast stations operating at power levels much greater than TIS operations. NTIA stated that they would support the secondary use proposal only in conjunction with an exclusive and primary frequency allocation at 1700 kHz. NTIA also stated that the Commission's proposal would disrupt existing TIS service. NTIA believes that one of the frequencies most likely to be requested first by migrating AM broadcast stations is 1610 kHz, because many receivers currently in use in the United States can tune to 1610 kHz, while only the most recent models include the expanded band to 1700 kHz. As a result, TIS operations in urban areas would be required to move because of the large separation distance requirements and could face early disruption of service under the Commission's proposal.

195. TIS interests also requested that TIS service be augmented through the establishment of TIS service contours, co-channel distance separations and provisions which would provide greater flexibility in transmitter power and antenna selection. While none of the parties addressing the TIS issue recommended specific technical assignment standards, many noted that any standards adopted should be consistent with those applicable to primary AM stations.

196. **Discussion.** Because we have decided that the expanded band would best be used to alleviate congestion in the lower AM band, we do not believe any specific allocation of an expanded band frequency for TIS operation on a primary basis would serve the public interest. However, the support for TIS operation on a secondary basis throughout the AM band (535-1705 kHz) appears substantial. The great number of frequencies on which TIS assignment would be possible would more than offset the loss, in a few areas, of the frequency 1610 kHz.[75]

197. Whereas we acknowledge the arguments advanced by NTIA concerning the dedication of the 1700 kHz channel exclusively to TIS stations, such an action would not be consistent with the central theme of this proceeding. This would be equivalent to a "set-aside" for TIS operators, and the Commission declined to create set-asides for any specific group because of the reduced capacity for implementation of its interference reduction goals. We do not agree with NTIA's assessment that a great many TIS operations currently on 1610 kHz will be forced to move to other channels due to displacement by new AM allotments. Due to preclusions stemming from existing band operations on 1590 and 1600 kHz, the opportunities for establishing new allotments in densely populated areas will be least prevalent on 1610 kHz, thereby making that frequency the least likely of the 10 new channels to be affected in terms of any displacement. Furthermore, if TIS were to be assigned exclusively to a single channel, as NTIA has requested, adjacent channel broadcast stations could totally prevent establishment of TIS in certain markets/areas.

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[75] See Section 90.242 of the Rules in connection with the allotment plan to be developed in order to determine the continued usability of 1610 kHz in any given area.

198. Multiple channel assignment flexibility for TIS offers possibilities of locating TIS where it can function optimally, with the option of selecting a frequency with a recognized absence of interference from broadcast stations, or even to provide multiple channel coverage for a given area. If federal/state/local governments elect to do so, they could concentrate TIS operations on 1700 kHz, with 1690 and 1680 kHz as spillover or backup channels; or, any other cluster of frequencies could be chosen, if it would be helpful in supporting the establishment of a TIS identity. Therefore, we will amend Section 90.242 to permit the authorization of TIS, on a secondary basis, on any assignable frequency in the AM band. Since TIS operation is secondary to AM broadcast station operation, TIS applicants must protect broadcast assignments in the 535-1605 kHz band and allotments in the 1605-1705 kHz band. Additionally, changes will be made to Part 2, Table of Frequency Allocations, Section 2.106 of the Rules.[76]

199. We also conclude that no change should be made in the current showings required of TIS applicants.[77] While we are sympathetic to the requests of TIS interests to augment TIS service to some extent, the current record lacks the technical specifics necessary for such an action. In addition, the Notice did not contemplate any changes and consideration of such changes is beyond the scope of this proceeding. Moreover, we believe prudence requires that some period of time elapse after the new general AM technical standards are implemented so that we can determine whether the intended benefits accrue to the AM service. We expect the next several years to be a period in which significant changes are made in many AM stations' facilities. We do not believe that such a dynamic operating environment is one which is conducive to the development of enhanced technical standards for TIS. The resolution of any unique difficulties associated with the installation of a particular TIS can be handled on a waiver basis.

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[76]By international agreement, 1605-1705 kHz is now available for broadcasting. The process which led to this reallocation required an intensive long-term planning effort which was conducted on a global scale. The 1979 International Telecommunication Union World Administrative Radio Conference (WARC) allocated 1605-1705 kHz to the broadcasting service in Region 2 (the western hemisphere), giving that service an exclusive allocation of 1605 to 1625 kHz and primary status from 1625 to 1705 kHz with implementation to occur in accordance with a future regional plan. A two-session Regional Administrative Radio Conference (RARC) held in 1986 and 1988 planned the spectrum and produced the rules under which we would share this new allocation with the other nations of Region 2. Therefore, the action we take in this proceeding is merely to change the domestic table to conform to the international table and to implement the long standing decision of the United States government to use 1605-1705 kHz for broadcasting. The U.S. delegations to both the WARC and the RARC were composed of representatives from the Department of State, FCC, NTIA and industry.

[77]Because TIS will be allowed to operate on any AM channel, co-channel standards have been added to the existing adjacent channel separation criteria in Section 90.242 of the Commission's Rules.

200. Lastly, the recommendation that TIS operation be permitted in the FM band is outside the scope of this proceeding. Our experience with TIS operation in the AM band has been very satisfactory. Its location in the AM band does not appear to discourage its use. On the contrary, as a service unique to the AM band it may have some benefit in encouraging listeners to explore what other programming is being provided there. Therefore, we are not inclined to facilitate the relocation of TIS to the FM band at this time.

VIII. Receiver Model

201. **Background/Proposal.** Finally, we turn to the issue of whether receiver manufacturers should be encouraged to modify their designs for AM radios, and, if so, what form that encouragement should take. The Notice proposed to establish criteria for a "single hypothetical model" AM receiver possessing "desirable and yet affordable performance attributes" to be used as a "reference" model to induce manufacturers to "make significant improvements in the performance of AM tuners." The NRSC draft recommendations were proposed as the basis for this model.[78]

202. **Comments.** Of more than 100 comments on the Notice, 25 addressed the issue of receiver standards. They divided into essentially three groups: those who requested mandatory receiver standards that would bar the sale of non-conforming receivers; those who supported voluntary standards; and those who opposed any standards. Proponents of mandatory standards pointed to earlier Commission actions in regard to the UHF television band, where some receiver standards were mandated in an effort to facilitate UHF TV reception. NAB, CBS, Group W, Motorola, and a number of consulting engineers supported our proposal for voluntary standards. They generally agreed that higher quality receivers can aid the revitalization of AM, and that the industry should be encouraged to design and market such units as soon as possible.

203. EIA/CEG and General Motors oppose Commission involvement in the receiver issue. The EIA is working with the NAB to develop desirable AM receiver criteria, with the intention of affixing a logo to receivers meeting such criteria. General Motors argues that its AM receivers are responsive to consumer preferences and that mandating a wide-band

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[78]The NRSC recommendations describe minimum performance standards for receivers designed to complement NRSC broadcast preemphasis and filtering functions, as defined in the NRSC-1 standard. These voluntary receiver standards address two aspects of receiver performance: audio frequency response and maximum non-linear distortion. To meet the guidelines, audio frequency response must encompass 50-7500 Hz, with limits of +1.5 dB and -3.0 dB, referenced to 0 dB at 400 Hz. Receivers capable of selecting more than one bandwidth must meet this requirement for at least one bandwidth. Permissible maximum non-linear distortion must not exceed 2% (THD+N) at measurement frequencies between 50 and 7500 Hz. For a complete text of the recommendation (NRSC-3), see Appendix A of NAB comments.

receiver now would be a mistake. GM believes that advances must be made against AM band problems of noise and interference before any meaningful improvements can be achieved in receiver performance.

204. **Discussion.** We believe it to be self-evident that good receivers are essential to the success of any competitive broadcast service. Radios must be able to receive and reconstruct the program information carried on a desired radio signal, to reject interference from undesired signals on adjacent channels, and to do so with minimal distortion. This means, in part, that the receiver bandwidth should match that of the transmitted signal yet not be so broad that the receiver cannot adequately reject unwanted sideband energy from adjacent channel signals. We are persuaded by the record that a proper balance of these objectives is not achieved in most AM receivers. Receiver manufacturers have chosen to emphasize adjacent channel rejection by strictly limiting receiver bandwidths and consequently severely reducing audio fidelity.[79] The result is that, in many cases, the experience of listening to an AM receiver is comparable to using a telephone - suitable for conversation but not for music. This undoubtedly contributes to the notion that AM radio is best suited to programs favoring "talk" formats. AM broadcasters limited in their choice of formats and unable to demonstrate to their audiences that they can deliver programs competitive in technical quality with that of other aural entertainment sources will not be able to support the rich diversity and extent of broadcasting we have achieved in this country. Clearly, attention must be paid to the improvement of receivers.

205. At the same time, arguments made in the record make us wary of any suggestion to impose mandatory receiver standards. The design of radios involves many tradeoffs among performance, features and cost; a choice made to appeal to one segment of the market may be inappropriate for another or may suit circumstances in one area but not elsewhere. Further, even if we could achieve consensus on a basic set of performance characteristics, the imposition of a compulsory standard would likely raise the costs of all receivers and eliminate models with which some buyers are presently satisfied.

206. Therefore, we have determined to proceed with our proposal as outlined in the Notice to use the recommendations of the NRSC in our spectrum planning assumptions. As stated in the Notice, we intend to treat them as recommendations to the receiver industry, not

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[79]In a presentation made at a late date in the proceeding, the Commission's staff was given the opportunity to compare recordings of AM signals from past decades with those of the present. The quality of the recordings reflected the use of different receivers and implied that the better quality recordings from earlier years resulted from the use of receivers that were of better quality. Although the presentation was made after the close of the comment period in this proceeding, we note that our action continues to avoid the imposition of mandatory receiver standards. For this reason and in view of the benefit of actual comparisons between earlier and later model receivers, we have taken note of the information provided in the presentation and will make every effort to promote better quality receivers for today's AM listeners.

requirements. In a related action, the Commission encouraged AM stations to implement NRSC-1 audio pre-emphasis in addition to requiring them to comply with NRSC-2, which sets the standard for the transmitted AM signal envelope. These actions were taken to narrow the bandwidth of the transmitted signal and thereby reduce inter-station interference. A logical follow-up to that effort would appear to be the adoption by the receiver manufacturers of the NRSC-3 receiver specifications, which match receiver bandwidth characteristics to those set for transmitters. As noted above, NRSC-3 addresses only the issues of bandwidth and distortion, and makes allowances for multiple bandwidth receivers. Adoption of that standard would not interfere with manufacturers' flexibility in continuing the production of narrow bandwidth receivers, nor would it preclude the marketing of wideband receivers that do not meet the NRSC-3 standard.

207. The Commission will at appropriate intervals publish a list of those receivers that meet the NRSC-3 standard or which are comparable so that consumers can make an informed choice when purchasing AM radios.[80] We do not believe that this step will detract from the efforts of EIA and NAB in developing a list of desirable receiver design features and affixing a special logo on such receivers. Nor do we believe that this step will adversely affect General Motors (or other auto makers) in their development of improved receivers.

208. The recent adoption by the Commission of the NRSC AM emission limitations, as noted above, will reduce occupied bandwidths and thus reduce interference, and the use of NRSC-compatible receivers will complement this reduction of unwanted signals by tailoring the receiver passband to that of the transmitted signal. We do not anticipate that any significant costs will be imposed on the industry or the public as a result of this action because the receiver standard is strictly voluntary. The costs incurred by the Commission in periodically compiling and releasing a list of conforming receivers will be minimal and can be done with existing resources.

209. Although advocated by a number of commenters, we are not including in the receiver model any specifications with respect to stereophonic reception. The two most frequently suggested specifications were that: (1) any receiver capable of FM stereophonic reception should also be capable of AM stereophonic reception, and (2) all AM stereophonic receivers should be capable of receiving and decoding both the Motorola and the Kahn stereophonic transmission systems.[81] A consumer who chooses to listen to musical programming on FM and news programming on AM should not be forced to purchase a stereophonic AM receiver. Therefore, we will not mandate that AM-FM receivers capable of receiving FM stereo signals must also be capable of receiving AM stereo signals.

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[80]In making this notification, the Commission will consider the 7.5 kHz specification to be a nominal rather than minimum criteria, noting Motorola's concerns about excessive receiver cost. See Motorola comments at 29.

[81]These systems must be decoded by different circuitry.

Nevertheless, we encourage receiver manufacturers to include AM stereo reception capability with NRSC-3 performance characteristics in their receivers.

XI. Other Matters

210. The Notice included proposed rules related to the specific issues addressed in this proceeding as well as a general revision of the existing AM rules. Regarding the inclusion of the latter rules, our intent was to update, correct or clarify specific rules which had been identified over time as being particular sources of uncertainty, or as being obviously inconsistent with other rules. The commenters presented some recommendations of their own which merit consideration and are addressed below. Most comments echoed the Commission's position that the proposed revisions were indeed valuable and necessary from the standpoint of administrative accuracy.

211. A specific rule change proposed in the Notice addressed the lack of specific direction contained within Section 73.152 regarding the filing of directional antenna pattern augmentation applications.[82] The proposed language would clearly enunciate the instructions that had been longstanding Commission staff policy. The rule would now include procedures which would promote efficient use of AM spectrum and, with the aid of these instructions, eliminate numerous amendments to applications which are routinely found to be not in compliance with policy. Additionally, we have concluded, based on the majority of the comments, that directional pattern augmentation will apply to stations in the expanded band for those operations in need of this procedure where the maximum allowable radiation is not exceeded. Stations would need to consider this using this process within the context of maintaining a radiation equivalence toward other allotments or areas of protection where the value of the radiated fields do not approach the maximum allowable limits.

212. On March 29, 1990, we released an Order[83] that curtailed the filing of most applications for new or changed facilities. That action was taken so as to avoid compounding present difficulties with a continuing flow of applications based on existing, possibly inadequate, standards. We believe that such restriction upon filing applications for new and changed facilities is no longer necessary and will be removed as of seventy (70) days from the date of the adoption of this Report and Order.

213. In the Notice we stated our desire to minimize the use of directional antennas in the expanded band. In the relatively few instances that simple directional antennas would be utilized, we proposed significantly less burdensome requirements for measurement data for

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[82]See Notice at paragraph 103.

[83]5 FCC Rcd 2136 (1990)

demonstrating pattern radiation compliance by removing the measurements required by Section 73.151(a)(1)(ii) and (a)(1)(iii). Few comments were received on this matter. Some generally expressed the concern that pattern integrity could not be ensured with relaxed directional antenna measurement requirements. Lahm, Suffa and Cavell, Inc., however, support the Commission's proposals to reduce the field strength measurement burden associated with license applications. While we share commenters concerns regarding pattern integrity, we believe that those concerns are not sufficient to justify the imposition of the expensive and time consuming full proof-of-performance requirements for those expanded band permittees that will be using simple antenna systems, such as two tower directional arrays. This is especially true when one considers that the additional expense associated with a full proof-of-performance could represent the decisional factor which may prevent an otherwise willing preferred migrator from moving to the expanded band. It is not our desire to place additional burdens in the way of potential migrators unless it is absolutely necessary to prevent interference. In this regard, it is our intention that directional antennas in the expanded band employ only a mild degree of pattern suppression for the purpose of increasing the utilization of the expanded band. Interference prevention will still be accomplished by wide distance separations between stations. This is in contrast to directional antennas in the existing band that frequently utilize deep nulls for station protection in several directions in order to shoehorn a station into an already congested band. For this reason we do not feel that absolute pattern compliance is as essential in the expanded band to prevent interference as it is in the existing band. Accordingly, for simple directional antenna systems in the expanded band (those utilizing two towers), we will require measured radials only in the directions for which the proposed allotment is short spaced with another co-channel or adjacent channel allotment. In this manner, we will ensure that equivalent protection is provided to all expanded band facilities. In the rare instances where a directional antenna system in the expanded band utilizes more than two towers, we believe that such antenna systems are of sufficiently complexity to warrant the filing of the measurement data required by Sections 73.151(a)(1)(ii) and (a)(1)(iii) of the Rules. Accordingly, in the isolated instances where a directional antenna system of more than two towers is used in the expanded band, full proof-of-performance requirements will apply.

214. A number of changes will be made to Part 2, Table of Frequency allocations, Section 2.106 of the Rules[84], in addition to those described in the section on the Traveler's Information Service, to implement the AM band expansion and to modify the conditions for non-broadcast use of the band 1605-1705 kHz[85]. These changes were proposed in the Notice, were not the subject of comment and generally reflect our decision to use that band for broadcast operation while continuing to permit operation of existing non-broadcast stations

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[84]47 C.F.R. Section 2.106.

[85]These uses include mobile and radiolocation services throughout the United States and, within the band 1615-1705 kHz, include maritime mobile and fixed services in Alaska. All of these services will operate on a secondary non-interference basis with respect to broadcasting.

provided interference is not caused to broadcast stations.

X. Summary and Conclusions

215. In this Report and Order we have taken a number of major steps to improve technical standards and thus to reduce the level interference in the existing band, to encourage certain existing licensees to move into the expanded portion of the AM band, and to consolidate existing broadcasting facilities in order to further reduce congestion and interference in the existing band. We have taken these steps in order to slow or reverse the trends in this band towards rising congestion and interference and declining listening audiences. While we are aware that the actions of broadcasters and listeners will ultimately determine the future direction of AM radio, it is our belief that the changes we have made will allow broadcasters to make changes that may greatly enhance their competitive position relative to other audio outlets.

XI. Administrative Matters

216. Because we are now issuing this Report and Order and closing this docket, we will also lift the freeze on AM applications on the effective date of this Report and Order. We will begin accepting applications for major modifications of existing AM stations and applications for new AM stations in the existing AM band. Such applications will be required to comply with the new technical standards that we adopt today. Applications currently on file that have been "cut-off" will not be required to amend. All others will be given sixty (60) days from the effective date of this Report and Order to file amendments to satisfy the requirements of the revised rules.

217. In Appendix D we have described an example allotment plan for the expanded band that conforms to our new technical requirements. At a date to be specified in the future, we will announce a filing window during which existing licensees will be allowed to file petitions to operate a station in the expanded band. Such petitioners will be required to comply with all relevant technical rules.

218. In the Report and Order in MM Docket No. 89-46, 5 FCC Rcd 4492 (1990), we adopted significant revisions to our Rules and policies concerning interference reduction agreements, elimination of "grandfathering" deleted AM facilities, contingent applications, local service floor, and competing applications. In the Report and Order in MM Docket No. 88-508, 5 FCC Rcd 4482 (1990), we adopted changes to our Rules for calculating skywave field strength utilizing a new, more accurate skywave propagation model that will better depict nighttime skywave service and interference on all channels. In the Report and Order in MM Docket No. 88-510, 5 FCC Rcd 4489 (1990), we substituted new groundwave propagation curves for the current curves which will allow for better prediction of groundwave service and interference. In those actions, we specifically stated that the

effective date of the revisions would be established in this proceeding. Accordingly, we are including the appropriate language in this Report and Order.

219. Appendix B contains our Final Regulatory Flexibility Analysis.

XII. Ordering Clauses

220. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 and 303, 47 U.S.C. Part 73 IS AMENDED as set forth below, effective seventy (70) days from the publication of this Report and Order in the Federal Register and upon OMB approval of these changes.

221. IT IS FURTHER ORDERED that the freeze currently in effect on AM broadcast station applications IS LIFTED effective seventy (70) days from the publication of this Report and Order in the Federal Register and upon OMB approval of revised FCC application Forms 301 and 302.

222. IT IS FURTHER ORDERED, That the amendments to Part 73 of the Commission's Rules adopted April 12, 1990, in MM Dockets No. 88-508, 88-510, and 89-46, ARE HEREBY MADE EFFECTIVE seventy (70) days from publication of this Report and Order in the Federal Register and upon OMB approval of those changes.

223. IT IS FURTHER ORDERED, That the petition for rule making filed May 25, 1989 by Earl J. Weinreb IS DENIED.

224. IT IS FURTHER ORDERED that MM Docket No. 87-267 IS TERMINATED.

225. Further information regarding this proceeding may be obtained by contacting Larry Olson, Mass Media Bureau at (202) 632-6955.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

List of Commenters in MM Docket No. 87-267

Comments:

3-D COMMUNICATIONS CORPORATION
ADVANCE BROADCASTING CORP., ET AL.
ALABAMA NATIVE AMERICAN BROADCASTING COMPANY
AMERICAN ASSOC. OF STATE HIGHWAY AND TRANSPORATION OFFICIALS
YORK DAVID ANTHONY
ASSOCIATION FOR BROADCAST STANDARDS, INC.
ASSOCIATION OF FEDERAL COMMUNICATIONS CONSULTING ENGINEERS
B&B BROADCASTING, INC., ET AL.
BELLEVUE SCHOOL DISTRICT
BIRACH BROADCASTING CORP.
BROADCASTING PARTNERS OF DALLAS, INC.
R. MORGAN BURROW, JR., P.E.
CALIFORNIA DEPARTMENT OF TRANSPORTATION
CALIFORNIA OREGON BROADCASTING, INC.
CAPITAL CITIES/ ABC, INC.
CAPITOL BROADCASTING COMPANY OF VIRGINIA
CAR AUDIO SPECIALISTS ASSOCIATION VEHICLE SECURITY ASSOCIATION
CBS, INC.
CHRISTENSEN BROADCAST GROUP, INC.
CHRISTIAN FAMILY NETWORK, WOLY
CITY OF PORT ANGELES, WA
CLEAR CHANNEL BROADCASTING SERVICE
COHEN, DIPPELL AND EVERIST, P.C.
CONSUMER ELEC GROUP OF THE ELECTRONIC INDUSTRIES ASSOCIATION
COX ENTERPRISES, INC.
CRAWFORD BROADCASTING COMPANY
DE LA HUNT BROADCASTING CORP.
DIAMOND BROADCASTERS, INC.
DU TREIL, LUNDIN & RACKLEY, INC.
E. HAROLD MUNN, JR. & ASSOCIATES, INC.
EBE COMMUNICATIONS LP.
ELECTRONIC INFORMATION AND EDUCATION SERVICE OF NEW JERSEY
JEFFREY EUSTIS
FIRELANDS BROADCASTING, INC.
GEORGE M. FRESE, P.E.
FULLER-JEFFREY BROADCASTING COMPANIES
GALLIMORE ELECTRONICS, INC.

GENERAL MOTORS RESEARCH CORPORATION
GLOBAL BROADCASTING SYSTEM, INC.
GOETZ BROADCASTING CORPORATION
GOLDENSTRIP BROADCASTING, INC.
GREAT EMPIRE BROADCASTING, INC.
GREATER MEDIA, INC.
GUARDIAN COMMUNICATIONS, INC.
GULF ATLANTIC MEDIA CORPORATION
H&C COMMUNICATIONS
THEODORE G. HAMMOND
HATFIELD & DAWSON, CONSULTING ENGINEERS, INC.
IDAHO STATE BOARD OF EDUCATION (BOISE STATE UNIVERSITY)
INDEPENDENT BROADCAST CONSULTANTS, INC.
INFORMATION STATION SPECIALISTS
JOHN FURR & ASSOCIATES, INC.
ROBERT A. JONES, R.P.E.
KENNETH J. JONES
KAHN COMMUNICATIONS, INC.
KEZM STEREO
KGRE(AM)
KGTN 1530 AM
KLOK RADIO, LTD.
KNOX BROADCASTING GROUP, INC.
KOLA, INC.
KQV(AM)
KSEV(AM)
KVI, INC.
LAHM SUFFA & CAVELL, INC.
LITTLE HAITI RADIO, INC.
LIVING COMMUNICATIONS OF CT.
LLOYD B. ROACH, INC.
MARINO BROADCAST ASSOCIATES
MARYLAND DEPARTMENT OF TRANSPORTATION
MICHIANA TELECASTING CORP.
MIDWEST RADIO ASSOCIATES
MOTOROLA, INC.
MULTILINGUAL COMMUNICATIONS ASSOCIATION
NATIONAL ASSOCIATION OF BROADCASTERS
NATIONAL PUBLIC RADIO
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
NEWTON-CONOVER COMMUNICATIONS, INC.
NORTH COAST RADIO, KNCR-AM
NORTHERN TELEVISION, INC.
PERSONS AND ASSOCIATES, INC.

POLNET BROADCASTING COMPANY, LTD.
PORT AUTHORITY OF NEW YORK AND NEW JERSEY
PULITZER BROADCASTING COMPANY
QUASS BROADCASTING CO.
RADIO ELIZABETH, INC.
RADIO NEVADA, INC.
JUAN C. RODRIGUEZ
SALEM MEDIA CORPORATION
EDWARD A. SCHOBER, P.E.
FREDERICK W. SEIBOLD
SELLMEYER ENGINEERING
SENATOR JOSEPH LIEBERMAN
DOUGLAS E. SMITH
SNIDER CORPORATION
SPANISH RADIO NETWORK
TALLEY BROADCASTING CORPORATION
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
TRIBUNE BROADCASTING COMPANY
UNITED BROADCASTING COMPANY
UNIVERSAL BROADCASTING CORPORATION
VIR JAMES P.C., BROADCAST ENGINEERING CONSULTANTS
VISION BROADCASTING COMPANY
FRED W. VOLKEN
WEST JEFFERSON BROADCASTING
WESTINGHOUSE BROADCASTING COMPANY
WEXL RADIO
WHOT, INC., AND THE JET BROADCASTING CO., INC.
WILLIAM CULPEPPER & ASSOCIATES
D.C. WILLIAMS, P.E.
WINCOM COMMUNICATINS, INC.
WKMB RADIO
WKQW RADIO
WLOI/WCOE
WMMW(AM)
WNTY(AM)
WNYC COMMUNICATIONS GROUP
WOODWARD COMMUNICATIONS, INC.
WQBB(AM)
WREF(AM)
WRIGHT STATE UNIVERSITY
WTTF INC.
YORK-CLOVER BROADCASTING COMPANY

Reply Comments:

ALABAMA NATIVE AMERICAN BROADCASTING COMPANY
BELLEVUE SCHOOL DISTRICT
BOOTH AMERICAN COMPANY
CAPITAL CITIES/ABC, INC.
CLEAR CHANNEL BROADCASTING SERVICE
COHEN, DIPPELL AND EVERIST, P.C., CONSULTING ENGINEERS
CRAWFORD BROADCASTING COMPANY
DU TREIL, LUNDIN & RACKLEY, INC.
JEFFREY EUSTIS
GREATER MEDIA, INC.
JOHN FURR AND ASSOCIATES, INC.
KAHN COMMUNICATIONS, INC.
KPSA RADIO
KARL D. LAHM, P.E.
LAHM, SUFFA & CAVELL, INC., CONSULTING ENGINEERS
LAMBERT & ANTHONY, CONSULTING ENGINEERS
R.J. MORAN
NATIONAL ASSOCIATION OF BROADCASTERS
RADIO ELIZABETH, INC.
THE TEN EIGHTY CORPORATION, ET AL.
D.C. WILLIAMS

Appendix B

Final Regulatory Flexibility Analysis

I. Need and Purpose of this Action:

1. The action is taken to update the current, antiquated AM broadcast rules, and make them more germane to an increasingly technologically advanced broadcasting industry. Our ultimate goal is to rejuvenate AM radio's competitive edge and thus revitalize its role in broadcast competition.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

2. No comments were received addressing the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

3. The commenters suggest a variety of alternatives to the proposed change of the baseline nighttime protection contour for those stations in the new Class B category to uniformly protect the 2.0 mV/m contour. These alternatives range from retaining the present rule to expanding the proposal to offer protection to higher values of field strength, particularly for daytime protected contours. We adopt the original proposal because we continue to believe that it best advances the goals and objectives of this proceeding, taking into consideration the unique operating situation of individual AM stations.

4. Several commenters ask that we revise the current values utilized for E_{min} and noise. Some of these commenters claim that the present values afford interference protection to signals which are too weak to provide any meaningful quality service. Others maintain that dramatic urbanization has significantly increased both man-made noise and AM signal attenuation, necessitating higher signal strength values to provide a comparable level of service. Still other commenters cite the temporal and geographic complexities illustrative of the difficulties in attempting to select a single appropriate value for E_{min}. These difficulties indicate that the selection of any other protected contour value would not, on balance, provide a more accurate benchmark and so we retain the values of minimum usable field strength, E_{min}.

5. The Notice proposed no change to the co-channel protection ratio. For the first adjacent channel, the Notice proposed to changed the ratio to 16 dB for the protection of groundwave service and 0 dB for skywave service, and for the second and third adjacent channel, no change. The commenters overwhelmingly support no change of the current

protection ratio, few comments deal with second and third adjacent channel protection, and no commenters address the specific subject of providing 0 dB adjacent channel protection to nighttime skywave services. We agree with the commenters proposing a first adjacent channel protection ratio of 6 dB, to be applied at the 0.5 mV/m contour. This value is more appropriate than the 16 dB originally proposed. As demonstrated in the comments, the adoption of 16 dB of additional protection at the 0.5 mV/m contour would largely preclude needed facilities modifications, thus effectively freezing the AM band at the current level of adjacent channel interference. The ratio adopted is more appropriate to the needs of wide-band reception without the need for such a freeze. Our position on second adjacent channel protection levels has also changed since adoption of the Notice. We now consider that change is required. However, the value proposed by some commenters, 2 mV/m overlap prohibition, is too restrictive a method of providing second adjacent channel protection. Therefore, we adopt a prohibition of overlap of the 5 mV/m contours of second adjacent channel stations. In so doing, we ensure that, within the daytime city coverage contours, full protection from second adjacent channel interference will be obtained.

6. The Notice proposed tightening the existing protection criteria by elimination of present RSS 50% exclusion methodology and replacing it with: (for new or changed facilities) a requirement that each station's individual limitation toward any other station not exceed 1.0 mV/m. Existing stations making changes that already exceed this threshold would need to reduce their signal to other stations by 10%; first adjacent channel signals would be included in calculations of service areas and new contributions would be evaluated for acceptable level; and RSS calculations would include all contributions and have significance only for coverage purposes. The commenters generally oppose the use of the proposed methods citing the resultant lack of flexibility for stations that may attempt to make any necessary changes or any type of upgrade. Those who oppose the RSS O% exclusion proposal note the resultant diminution of service area when additional contributions from co-channel and adjacent channel stations are included in the RSS calculation. A number of these commenters recommend as an alternative that RSS calculations be performed using a RSS 25% exclusion method. Those who support the proposals contained in the Notice as well as the 1 mV/m and single signal concepts generally ask that the entire process include some degree of flexibility for cases that involve circumstances that are beyond the control of the licensees. We agree that in certain instances which might lie beyond the applicant's control, occasions may arise when the 10% reduction would not be possible. In these situations, we would allow for some flexibility for exceptional cases where reduction could not be performed without the waiver of other technical requirements. The proposal adopted strikes the best balance between the ideals of mathematical accuracy and interference reduction and the business of operating a radio station in the AM band.

7. We considered three options regarding city coverage requirements: (1) to require that expanded band stations have more than 50% city nighttime coverage; (2) to adopt, as proposed in the Notice a required nighttime coverage of 50% of the principal community by the 5 mV/m or the interference-free contour, whichever is greater; and (3) to adopt a modified version of option 2 that would clarify that 50% coverage will be acceptable

only for migrating stations not proposing to change their city of license. We enact option 3 because adoption of a rule that would allow a broader scope of action is beyond the goals of this proceeding and because it improves on the option suggested in the Notice by clarifying that the proposed rule was intended only to facilitate migration and not to permit changes in the city of license precluded by the current rule.

8. The third prong of our decision involves the migration of existing AM stations to the expanded band. In that regard, commenters offer several suggestions for different migration preference factors as alternatives to the priority scheme proposed in the Notice and adopted (with some modification) in this decision. Some parties hold that the proposed scheme would offer the least incentive to migrate to the stations the Commission would most like to attract to the expanded band. Those stations are older, well established nighttimers, which cause the most interference, but also have the largest coverage areas. Thus, these parties recommend that preferences should go to stations with high nighttime RSS's and small interference free service areas. We dismiss this proposal because stations that have high nighttime interference free contours, in most cases, cause the least amount of interference to other existing stations. Other commenters urge that the FCC switch its emphasis to service provided, and submit some alternative ratios that they believe represent more appropriate factors. Another commenter asks that first local service be given a preference before others, and still others propose that TIS users be assigned to 1690 and 1700 kHz, and an additional two full channels be set aside for educational broadcasters. We adopt the priority scheme basically as proposed, because we believe that revising that scheme through an emphasis on stations receiving interference as opposed to stations causing interference would be counterproductive because it would stray from our goal in this proceeding, to reduce congestion and interference in the AM band. Making a specific allocation to TIS on 1690 and 1700 kHz would impair the expanded band's ability to accommodate preferred migrators. We defer to the commenters, though, who support a daytime interference factor, and adopt a revised improvement factor scheme which incorporates a preference factor for daytime interference caused in addition to the proposed factor for nighttime interference.

9. We reviewed three possible options concerning Travelers Information Stations, which are authorized to operate at 1610 kHz, 10% of the expanded AM band. The first option would allow TIS operation in the expanded band on a strictly secondary basis, with TIS licensees bearing the cost of any necessary frequency changes or stations relocations. The second option would authorize TIS operation on any frequency between 535 kHz and 1705 kHz on a secondary basis. The final option favored a primary TIS allocation on 1700 kHz, as well as TIS operation on frequencies between 535 kHz and 1705, and that TIS service be augmented through the establishment of TIS service contours, co-channel distance separations and provisions. We elect to allow TIS operation on a secondary basis through the AM band (535 kHz to 1705 kHz) because the loss, in some areas, of the 1610 kHz frequency would be offset by the great number of frequencies available for TIS assignment. We do not believe that any specific allocation of an expanded band frequency for TIS on a primary basis, such as suggested in option three, would be in the public interest. We also find that no change should be made in the current TIS assignment standards because of the lack of a

record supporting such a change. We further conclude that authorization of TIS operation is beyond the scope of this proceeding.

10. Three possible scenarios were considered for the planning method for development of the expanded band, allotment planning, assignment planning, and the flexible method proposed in the Notice. Given the lack of comment on this issue, we chose the flexible allotment plan as originally proposed.

11. The Notice sought comment on possible reimposition of an AM-FM program nonduplication rule. The Report and Order does not adopt an AM-FM program nonduplication rule. The Commission will revisit the issue after three years.

Appendix C

RSS Illustration

The calculation of nighttime skywave interference to a station (other than a Class I station) from multiple interfering sources is done by the Root-Sum-Square (RSS) method. The RSS method calculates the square-root of the sum of the squares of the individual limits on service imposed by each interfering signal and is shown mathematically as follows:

$$RSS = \sqrt{L_1^2 + L_2^2 + L_i^2 + \ldots + L_n^2}$$

Where: n is the total number of stations
$i = 1, 2, \ldots, n$
L_i is the limit from the ith station

Each individual limit is obtained by determining the field strength of the interfering skywave signal radiated by one station at the transmitter site of the station receiving interference and then multiplying the results by the co-channel (20:1) or adjacent channel (2:1) protection ratio, as appropriate.

The following example illustrates the use of the RSS method and, particularly, the application of this method with respect to the rules adopted in this proceeding. In the example, Station A receives interfering signals from Stations 1 through 20. The interfering effects of each station are considered in order of decreasing magnitude. The actual RSS is composed of all the interfering signals and is called the RSS 0% exclusion value since no signals are excluded from the calculations. Applying a 50% exclusion principle to the RSS calculation means that each succeeding signal is compared to the Running RSS and if it is less than 50% of the Running RSS its value is excluded from the RSS. The same reasoning applies to use of the RSS 25% exclusion method. The use of the exclusion principle places greater weight on the higher value signals and simplifies the calculations, an important point years ago when the RSS methods were first developed and inexpensive computers were not available.

In the example shown below Station A receives interference from the interfering skywave signal of Station 1, a value determined to be 0.6065 mV/m calculated at the transmitter site of Station A. Multiplying this value by the co-channel protection ratio gives:

$$L_1 = 0.6065 \times 20 = 12.13 \text{ mV/m}$$

This means that Station A is limited by the interference from Station 1 to service inside its 12.13 mV/m contour. Said another way, Station 1 imposes a limit on Station A of 12.13

mV/m. The Running RSS column shows the cumulative effect of multiple interferers. The collective effect of Stations 1, 2 and 3 is to limit Station A to service inside its 16.67 mV/m contour.

Interference to Station A

Station #	Limit (mV/M)	Running RSS (mV/m)
1	12.13	12.13
2	8.62	14.88
3	7.51	16.67
4	7.13	18.13
5	6.41	19.23
6	5.95	20.13
7	5.25	20.80
8	4.31	21.24
9	3.52	21.53
10	2.90	21.73
11	2.13	21.83
12	1.67	21.90
13	1.43	21.94
14	1.16	21.97
15	0.93	21.99
16	0.86	22.01
17	0.81	22.02
18	0.72	22.04
19	0.64	22.05
20	0.53	22.05

The following figure graphically illustrates the effect of the above interfering signals on Station A. For instance, when all signals are considered, Station A is limited to the 22.05 mV/m contour. If RSS 50% exclusion is used, Station A is limited to the 16.67 mV/m contour. If RSS 25% exclusion is used, Station A is limited to the 20.80 mV/m contour. As shown on the graph, the top three contributors who are included in the RSS 50% exclusion calculation would be required to reduce radiation in the direction of Station A by 10% in order to modify their facilities. The next four, falling between the 50% and 25% values, would be required to maintain their signal levels in order to modify their facilities. Finally, the remaining contributors would be able to increase their radiation, but only up to the 25% line. In an established service, however, few if any of these stations would be able to raise their individual limits by a significant amount because of the need to protect stations other than Station A. For example, Station #19 may be the principal contributor of interference to Station #14 and therefore might be unable to increase its nighttime radiation.

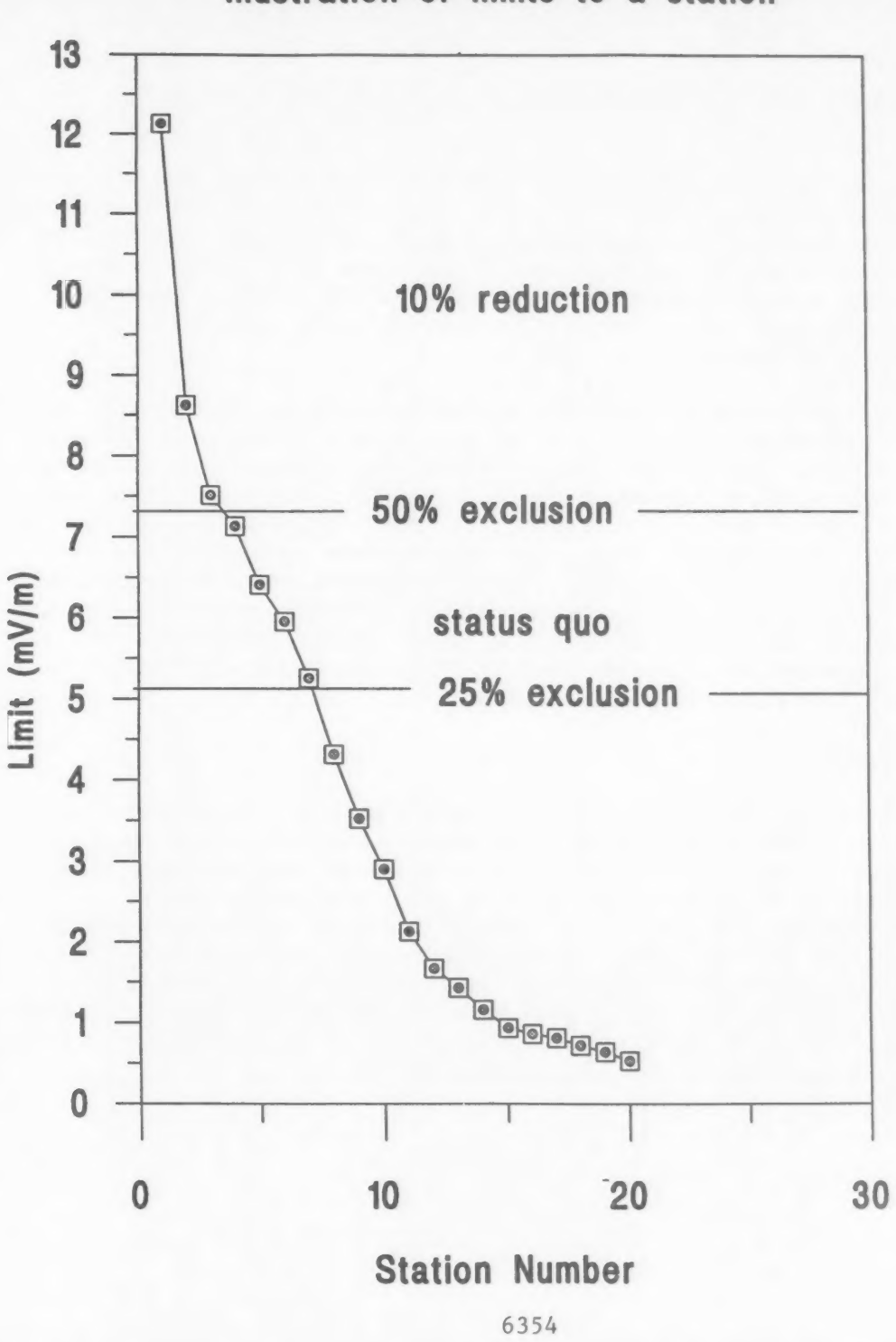


Illustration of limits to a station
13
12
11
10
9
8
7
6
5
4
3
2
1
0
Limit (mV/m)
10% reduction
50% exclusion
status quo
25% exclusion
0
10
20
30
Station Number
6354

Appendix D

SAMPLE PLAN FOR THE ALLOTMENT OF THE EXPANDED BAND

The attached sample allotment plan for the expanded band was developed using most of the procedures and computer methodology that will be in effect when the frequencies are actually allocated. Exceptions to the actual steps to be used in the final allotment scheme are noted below. This sample plan is presented purely as an illustration of the techniques that will be used at a later time in developing the allotment scheme for the final plan. The results included here do not prejudice or have any bearing on the outcome of the actual plan to be developed at a future time.

The 361 letters of intent received in response to the Notice were individually evaluated and classified according to the station's operating status, e.g., fulltime, daytime-only and Class IV. An improvement factor (IF) which represents the extent of improvement in the existing band if they were to migrate to the expanded band (See para. 125 of the Report and Order) was then calculated for each station participating in the survey. The individual stations were then sequentially ranked from the highest to the lowest based on the values of their corresponding improvement factors. The methodology utilized to develop this sample plan, and eventually, the determination of actual allotments in the final plan, represent the best practical solution to the task of awarding and distributing the expanded band spectrum. No comments were received in this proceeding which suggested any detailed procedure by which the allotments could be efficiently distributed geographically.

PROCEDURE

Starting with the station with the highest improvement factor value, whenever its location was not precluded from receiving an allotment, that station was assigned a frequency starting from the lowest serviceable channel (1610 kHz, if possible). To place each additional allotment, a computerized positioning routine was used to test every available combination of frequency/location distribution for all the allotments already selected until a suitable fit was obtained. This was done in order to find a location/frequency for the station in the list with the next highest improvement factor. When, despite computerized manipulation of the previously allotted stations, a location was considered for which no frequency was available, that letter of intent was removed from further consideration and the next highest improvement factor was then subjected to the searching and adjusting process.

The study was run under the following set of conditions:

SPACING CRITERIA:

- Co-channel: 800 kilometers
- 1st adjacent channel: 200 kilometers
- 2nd adjacent channel: 53 kilometers
- 3rd adjacent channel: no spacing restrictions were used for this study.

DATA BASE USED:

The data base records used in the sample plan analysis consisted of the following selected records from the FCC's AM Engineering Data Base dated July 2, 1991. The records used for improvement factor calculations as well as for protection of existing authorizations on 1580, 1590 and 1600 kHz were as follows:

(1) U.S. license records (Those records that showed domestic status of II-S or III-S but had an antenna RMS greater than 141 mV/m were also included).

(2) Canadian and Bahamian operational records.

(3) Mexican operational records except those from Change List 298 or later that are not acceptable.

PRIORITIZATION:

The letters of intent were divided into the following four groups of descending priority:

(1) Full-time stations - for purposes of this study, those with a record indicating nighttime operation in the above-mentioned data base.

(2) Daytime-only stations that were licensed to a community of over 100,000 population, without any local nighttime aural service and which were located within the 0.5 mV/m-50% nighttime skywave contour of a Class I station.

(3) All other daytime-only (new Class D) stations.

RANKING OF STATIONS:

Stations were ranked based on the following:

(1) Full-time stations - the nighttime improvement factor was calculated.

(2) Daytime-only and local channel stations - no improvement factors were available at this time. Stations were considered in alphabetical state/city order.

Due to time constraints, certain programming routines are still in the development stage. Therefore, some elements of the final procedure are not included in this sample allotment plan. Exceptions pertinent to this sample study are as follow:

(1) International allotment prioritization criteria was suppressed for this sample plan.

(2) Improvement factors for daytime interference were not used in the ranking process.

(3) Only the 48 conterminous states were considered in this exercise.

(4) Data base records were not scrutinized for complete accuracy or applicability to this study. As an example, the ranking associated with station WKCM is affected by the inadvertent inclusion of the limited-time record of WJJD, Chicago, IL within the nighttime study, thereby skewing its standing in the ranking process.

(5) The above mentioned spacings were used when considering existing band assignments on 1590 and 1600 kHz. During the actual allotment planning process, actual service contours of these stations will be considered and their distances calculated to guarantee their full protection.

The study reveals that locations with the potential for additional expanded band allotments are available. Letters of intent were not submitted for these particular locations. We note that the unused portion of this resource could provide greater benefits from the use of its full capacity. Moreover, other petitioners might have been accommodated with additional allotments, had the use of simple directional antennas been incorporated in this study. The plan as shown here was designed with no attempt made to alter the basic spacing criteria that are specified above although that is an option we plan to use for developing the actual allotment plan. The results of this preliminary study show that 95 of the 361 letters of intent are accommodated by the sample allotment plan.

MAPS

The attached maps depict the distribution of the allotments that were selected in this sample study. A map is included for each of the 10 expanded band frequencies. Additionally, 10 maps are presented to illustrate the preclusive impact each channel and include the effect of the existing band operations on 1590 and 1600 kHz. Each of the 10 maps for the frequencies 1610-1700 kHz illustrates the occupancy of that channel and includes the following features:

(1) The allotments assigned to the subject frequency circumscribed by their 800 km radii of preclusion for other co-channel allotments.

(2) The allotments assigned to the two channels first adjacent to the subject channel and the area of preclusion described by their 200 km spacing radii.

(3) The allotments assigned to the two channels second adjacent to the subject channel and the area of preclusion described by their 53 km spacing radii.

Also attached are several maps depicting the relative nighttime coverage areas of present licenses versus those which would result in the expanded band given the allotments made in this study. As is indicated by these illustrations, in most cases, substantial improvements in coverage can be expected, however, there are some cases where the improvement would appear to be marginal, and one case where the movement to the expanded band would not be beneficial.

EXPANDED BAND SAMPLE ALLOTMENT PLAN
STATION RECORDS LISTING

(Note: IF represents the Improvement Factor)

Rank	IF	Allot	Freq.	Call	Location	Coordinates
Full-time Stations:						
1	12.50	1640	1160	WKCM	KY HAWESVILLE	37-54-20N 86-45-30W
2	10.19	1620	1010	WMOX	MS MERIDIAN	32-23-42N 88-39-28W
3	6.63	1680	1420	KRIZ	WA RENTON	47-26-25N 122-12-09W
4	6.41	1650	680	WRGC	NC SYLVA	35-23-35N 83-11-38W
5	4.88	1650	1380	WPLB	MI GREENVILLE	43-09-18N 85-15-25W
6	4.82	1690	1590	WGYJ	AL ATMORE	31-02-12N 87-29-42W
7	4.82	1680	610	WUSQ	VA WINCHESTER	39-11-53N 78-13-13W
8	3.90	1700	1480	KRED	CA EUREKA	40-44-28N 124-12-05W
19	3.86	1680	1430	WLKF	FL LAKELAND	28-02-27N 81-56-08W
10	2.93	1630	1360	WKMI	MI KALAMAZOO	42-19-36N 85-31-39W
11	2.53	1690	1590	WQQW	CT WATERBURY	41-35-27N 73-02-34W
12	2.48	1640	1590	WCBG	PA CHAMBERSBURG	39-54-15N 77-39-45W
13	2.47	1680	1390	WTJS	TN JACKSON	35-38-46N 88-49-57W
14	2.27	1680	1600	WSNZ	MI MUSKEGON	43-11-50N 86-13-22W
15	2.26	1660	970	KHVN	TX FORT WORTH	32-47-56N 97-17-43W
16	2.20	1640	1150	WNDB	FL DAYTONA BEACH	29-14-06N 81-04-19W
17	2.10	1620	550	WSVA	VA HARRISONBURG	38-27-04N 78-54-29W
18	1.77	1630	1040	WHBO	FL PINELLAS PARK	27-50-50N 82-46-21W
19	1.73	1680	1420	KJCK	KS JUNCTION CITY	39-01-33N 96-48-36W
20	1.69	1690	1420	KBTN	MO NEOSHO	36-50-52N 94-19-12W
21	1.57	1640	920	KBNA	TX EL PASO	31-45-41N 106-26-14W
22	1.52	1700	550	KBOW	MT BUTTE	45-58-30N 112-34-18W
23	1.41	1660	1600	WXTO	FL WINTER GARDEN	28-34-06N 81-31-09W
24	1.38	1700	570	WGMS	MD BETHESDA	39-02-07N 77-10-11W
25	1.32	1660	1600	WINX	MD ROCKVILLE	39-05-51N 77-09-07W
26	1.31	1670	1380	WAOK	GA ATLANTA	33-45-36N 84-28-45W
27	1.24	1670	1420	WBSM	MA NEW BEDFORD	41-39-02N 70-54-58W
28	1.24	1700	930	KBFW	WA BELLINGHAM-FERNDA	48-47-52N 122-28-01W
29	1.15	1670	1310	WDPN	OH ALLIANCE	40-55-34N 81-07-41W
30	1.13	1700	920	KARN	AR LITTLE ROCK	34-46-20N 92-14-45W
31	1.09	1670	950	KLIK	MO JEFFERSON CITY	38-31-13N 92-10-42W
32	1.09	NONE	1200	WAGE	VA LEESBURG	39-07-25N 77-37-31W
33	1.07	1690	1270	WUCO	OH MARYSVILLE	40-14-46N 83-19-50W
34	1.05	1620	1140	KCMJ	CA PALM SPRINGS	33-51-39N 116-28-20W
35	1.04	1630	920	WPTX	MD LEXINGTON PARK	38-16-57N 76-33-35W
36	1.02	1650	1590	WERA	NJ PLAINFIELD	40-34-39N 74-24-10W
37	1.01	1660	1370	WGCL	IN BLOOMINGTON	39-11-25N 86-38-02W
38	.99	NONE	1380	WQHK	IN FORT WAYNE	41-00-10N 85-05-50W
39	.95	1700	1440	WPRD	FL WINTER PARK	28-35-18N 81-22-53W
40	.93	1700	1270	WCMR	IN ELKHART	41-37-18N 85-57-37W
41	.89	NONE	1520	WQWQ	MI MUSKEGON HEIGHTS	43-08-28N 86-14-50W
42	.88	NONE	1430	WXKS	MA EVERETT	42-24-11N 71-04-29W
43	.88	NONE	1380	WSYB	VT RUTLAND	43-35-35N 72-59-25W
44	.87	NONE	1460	WPON	MI PONTIAC	42-36-23N 83-17-28W
45	.85	1690	1550	KMXI	WA VANCOUVER	45-38-47N 122-30-51W
46	.83	1620	920	KQEU	WA OLYMPIA	47-01-52N 122-51-10W
47	.81	1680	1440	KDIF	CA RIVERSIDE	34-01-37N 117-21-27W
48	.79	NONE	980	WONE	OH DAYTON	39-40-03N 84-10-01W
49	.72	NONE	1260	WNDR	NY SYRACUSE	43-01-32N 76-03-55W
50	.72	NONE	1550	WCTZ	TN CLARKSVILLE	36-32-12N 87-22-24W
51	.70	NONE	1600	WGIV	NC CHARLOTTE	35-14-57N 80-51-41W
52	.70	1620	920	KQEO	NM ALBUQUERQUE	35-06-36N 106-40-04W
53	.65	1630	1590	KOGO	CA VENTURA	34-14-12N 119-12-11W

Rank	IF	Allot	Freq.	Call	Location	Coordinates
54	.59	NONE	1470	WTTR	MD WESTMINSTER	39-34-37N 77-01-21W
55	.59	1640	1600	KBOR	TX BROWNSVILLE	25-56-57N 97-33-15W
56	.58	NONE	1250	WARE	MA WARE	42-14-41N 72-12-30W
57	.58	1690	1270	WYAK	SC SURFSIDE BEACH-GA	33-34-32N 79-02-29W
58	.57	NONE	1330	WYWR	OH CAMPBELL	41-05-26N 80-36-56W
59	.54	1620	1020	KRAD	OK PERRY	36-15-35N 97-13-01W
60	.50	1670	790	KOQO	CA CLOVIS	36-50-39N 119-41-13W
61	.50	1680	1460	WACO	TX WACO	31-31-01N 97-06-38W
62	.49	1620	1440	WBCI	IL NORMAL	40-25-25N 88-52-30W
63	.48	1690	1460	KKCS	CO COLORADO SPRINGS	38-49-36N 104-44-30W
64	.44	1700	1300	KAZN	CA PASADENA	34-09-38N 118-04-46W
65	.43	NONE	1300	WERE	OH CLEVELAND	41-20-28N 81-44-29W
66	.43	1660	1390	KLGN	UT LOGAN	41-44-04N 111-51-13W
67	.42	1670	1210	KQTL	AZ SAHUARITA	32-02-04N 110-56-45W
68	.41	1670	1150	KFRR	CO ENGLEWOOD	39-36-18N 104-50-25W
69	.41	NONE	1320	WSCR	PA SCRANTON	41-26-25N 75-40-30W
70	.40	NONE	1600	WUNR	MA BROOKLINE	42-17-20N 71-11-22W
71	.40	NONE	1320	WKAP	PA ALLENTOWN	40-37-40N 75-29-09W
72	.40	1680	690	KHEY	TX EL PASO	31-58-11N 106-21-15W
73	.40	1660	790	KGMI	WA BELLINGHAM	48-43-09N 122-26-43W
74	.40	NONE	1440	WNFL	WI GREEN BAY	44-28-40N 88-00-00W
75	.39	1620	1300	WXXU	FL COCOA BEACH	28-20-38N 80-46-06W
76	.39	1680	1310	WLOB	ME PORTLAND	43-41-22N 70-20-06W
77	.38	NONE	1470	WQSN	MI KALAMAZOO	42-14-11N 85-34-37W
78	.38	NONE	1260	WRDZ	OH CLEVELAND	41-17-10N 81-38-34W
79	.37	NONE	1600	WWRL	NY NEW YORK	40-47-44N 74-03-18W
80	.37	NONE	1590	WAKR	OH AKRON	41-01-14N 81-30-20W
81	.37	1640	1430	KQLL	OK TULSA	36-14-10N 95-56-50W
82	.36	NONE	600	WTAC	MI FLINT	42-56-23N 83-37-41W
83	.35	NONE	1600	WCWC	WI RIPON	43-49-01N 88-50-49W
84	.33	NONE	1570	WKBH	WI HOLMEN	43-55-32N 91-16-02W
85	.32	NONE	960	WLV	MD SALISBURY	3-82-54N 7-53-72W
86	.32	NONE	1310	WMTG	MI DEARBORN	42-15-50N 83-15-14W
87	.30	NONE	1600	WKEN	DE DOVER	39-10-11N 75-33-13W
88	.30	NONE	1460	WFYV	FL JACKSONVILLE	30-19-40N 81-44-49W
89	.30	NONE	1390	WCSE	SC CHARLESTON	32-49-26N 80-00-06W
90	.29	1650	560	KBLU	AZ YUMA	32-43-25N 114-38-39W
91	.29	NONE	1430	WFOB	OH FOSTORIA	41-06-11N 83-24-00W
92	.28	NONE	1170	KSTT	IA DAVENPORT	41-23-22N 90-31-08W
93	.28	NONE	1570	WILO	IN FRANKFORT	40-16-40N 86-29-07W
94	.27	NONE	910	WNEZ	CT NEW BRITAIN	41-42-58N 72-48-38W
95	.27	1650	1190	KJLA	MO KANSAS CITY	39-03-49N 94-30-37W
96	.26	NONE	1460	WGNA	NY ALBANY	42-37-21N 73-48-09W
97	.25	NONE	1410	WING	OH DAYTON	39-40-56N 84-09-33W
98	.25	NONE	1170	WWVA	WV WHEELING	40-06-07N 80-52-02W
99	.24	NONE	800	WTMR	NJ CAMDEN	39-54-33N 75-06-00W
100	.21	1630	1070	WDIA	TN MEMPHIS	35-16-05N 90-01-03W
101	.21	1670	1010	KLAT	TX HOUSTON	29-55-06N 95-30-58W
102	.20	1650	1480	KBMS	WA VANCOUVER	45-36-06N 122-43-06W
103	.19	NONE	1410	WNCQ	NY WATERTOWN	43-57-08N 75-52-33W
104	.19	NONE	1580	WVKO	OH COLUMBUS	40-02-50N 83-03-44W
105	.19	1630	1350	KCOR	TX SAN ANTONIO	29-31-27N 98-37-05W
106	.18	NONE	1280	WKQG	NY ROCHESTER	43-05-54N 77-35-00W
107	.16	1630	960	KALE	WA RICHLAND	46-14-34N 119-10-48W
108	.15	NONE	1570	WRHD	NY RIVERHEAD	40-54-48N 72-39-16W
109	.14	NONE	1380	WAMS	DE WILMINGTON	39-48-12N 75-37-42W
110	.14	NONE	1350	WBSK	VA PORTSMOUTH	36-53-00N 76-22-22W
111	.14	1640	1050	KBLE	WA SEATTLE	47-34-35N 122-21-52W
112	.12	NONE	920	WTTM	NJ TRENTON	40-15-19N 74-51-44W
113	.11	1660	770	KKOB	NM ALBUQUERQUE	35-12-09N 106-36-41W

Rank	IF	Allot	Freq.	Call	Location	Coordinates
114	.10	1690	1580	KLOQ	CA MERCED	37-17-31N 120-26-03W
115	.08	1660	1570	KYCR	MN GOLDEN VALLEY	44-59-51N 93-21-10W
116	.07	1650	1310	KDIA	CA OAKLAND	37-49-27N 122-19-10W
117	.06	1650	940	WINZ	FL MIAMI	25-57-36N 80-16-13W
118	.04	NONE	1510	WLAC	TN NASHVILLE	36-16-15N 86-45-24W
119	.04	NONE	660	KSKY	TX BALCH SPRINGS	32-45-02N 96-41-41W
120	.04	1690	1160	KFHM	TX SAN ANTONIO	29-32-11N 98-41-08W
121	.02	1660	1020	KTNQ	CA LOS ANGELES	34-02-00N 117-59-00W
122	.02	1690	710	WAQI	FL MIAMI	25-58-07N 80-22-44W
123	.01	NONE	1580	WSRF	FL FORT LAUDERDALE	26-04-54N 80-13-34W
124	.00	1640	540	KJQI	CA HESPERIA	34-31-13N 116-56-24W
125	.00	NONE	940	KFRE	CA FRESNO	36-29-20N 119-19-33W

Daytimers within 0.5 mV/m-50%, no aural, and pop. > 100,000:

126	NONE	1530	WJDM	NJ ELIZABETH	40-41-25N	74-15-40W

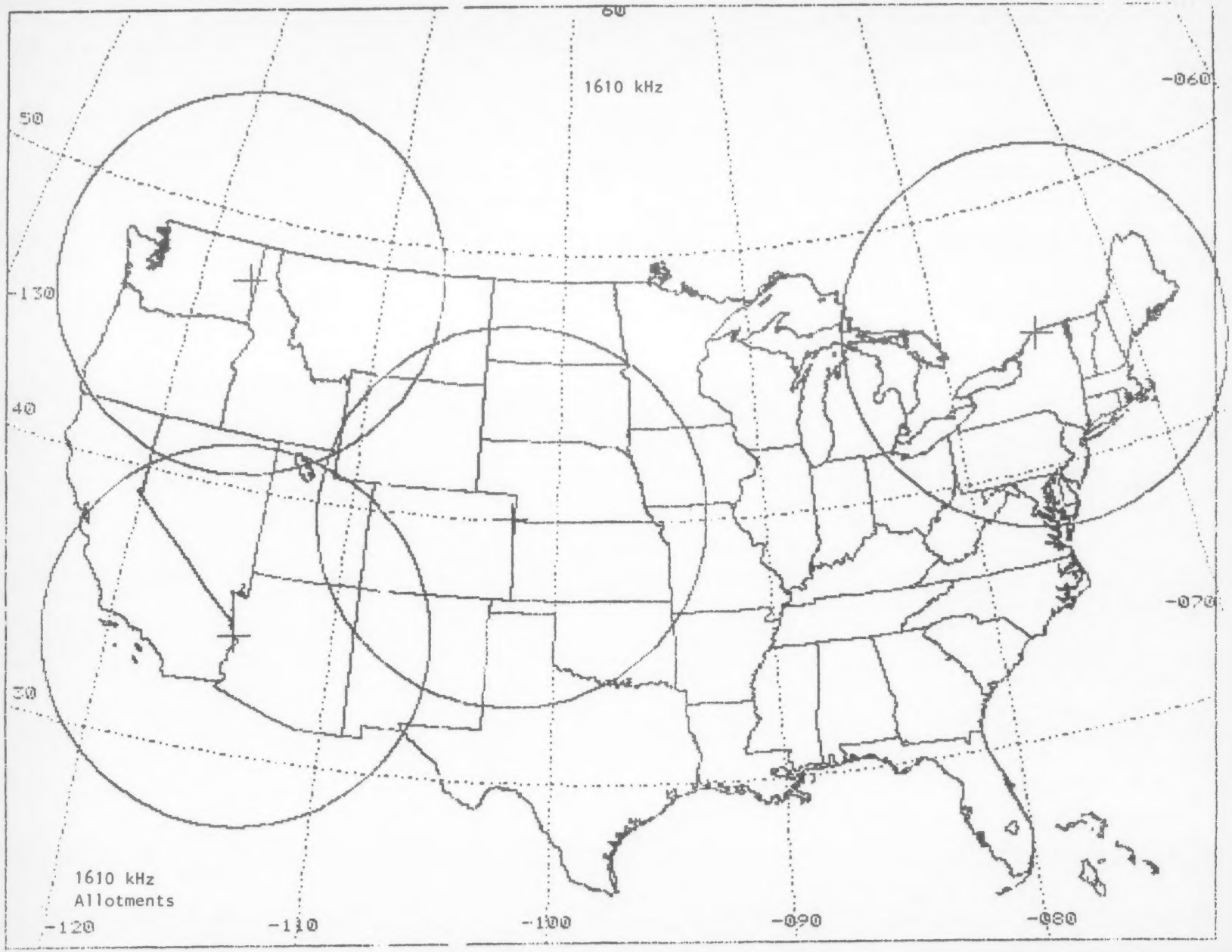
Other daytimers:

127	NONE	1480	WARI	AL ABBEVILLE	31-35-17N	85-16-51W
128	NONE	1080	WLVN	AL BRANTLEY	31-41-12N	86-16-02W
129	NONE	1560	WRDJ	AL DALEVILLE	31-16-35N	85-45-54W
130	NONE	1200	WFSF	AL OZARK	31-23-46N	85-30-01W
131	NONE	1510	KVOG	AR GREENWOOD	35-12-12N	94-16-41W
132	NONE	1420	KXOW	AR HOT SPRINGS	34-27-19N	93-03-26W
133	1630	1270	KDJI	AZ HOLBROOK	34-53-55N	110-11-30W
134	1610	980	KFWJ	AZ LAKE HAVASU CITY	34-29-41N	114-20-59W
135	1690	1540	KASA	AZ PHOENIX	33-26-54N	112-04-24W
136	NONE	1550	KUAT	AZ TUCSON	32-13-18N	110-55-33W
137	NONE	1310	KIQQ	CA BARSTOW	34-54-51N	117-00-59W
138	NONE	1410	KRML	CA CARMEL	36-32-11N	121-54-13W
139	NONE	1430	KAMP	CA EL CENTRO	32-47-31N	115-33-44W
140	NONE	1050	KNOB	CA FRAZIER PARK	35-01-28N	118-55-05W
141	NONE	1530	KHPY	CA MORENO VALLEY	34-00-42N	117-11-03W
142	NONE	1570	KTGE	CA SALINAS	36-41-49N	121-37-22W
143	NONE	1460	KRRS	CA SANTA ROSA	38-22-13N	122-43-39W
144	1640	1470	KSIR	CO ESTES PARK	40-20-15N	105-31-36W
145	1610	1440	KRDZ	CO WRAY	40-04-56N	102-11-25W
146	NONE	1550	WLVX	CT BLOOMFIELD	41-51-47N	72-44-01W
147	NONE	1220	WXCT	CT HAMDEN	41-22-39N	72-55-44W
148	NONE	1500	WFIF	CT MILFORD	41-11-33N	73-06-05W
149	NONE	840	WRYM	CT NEW BRITAIN	41-41-15N	72-43-46W
150	NONE	990	WNTY	CT SOUTHINGTON	41-34-59N	72-53-01W
151	NONE	1120	WUST	DC WASHINGTON	38-55-04N	77-01-27W
152	NONE	930	WYUS	DE MILFORD	38-55-39N	75-29-20W
153	NONE	1290	WJBR	DE WILMINGTON	39-44-03N	75-31-44W
154	NONE	840	WPGS	FL CASSELBERRY	28-37-04N	81-13-31W
155	NONE	1580	WTCL	FL CHATTAHOOCHEE	30-40-14N	84-50-08W
156	NONE	1010	WXTL	FL JACKSONVILLE BEAC	30-18-36N	81-54-01W
157	NONE	730	WWTK	FL LAKE PLACID	27-24-25N	81-25-56W
158	NONE	1370	WOCA	FL OCALA	29-12-04N	82-09-07W
159	NONE	900	WMOP	FL OCALA	29-14-17N	82-07-17W
160	NONE	1480	WVCF	FL OCOEE	28-33-27N	81-32-29W
161	NONE	1570	WOKC	FL OKEECHOBEE	27-12-59N	80-49-53W
162	NONE	1420	WAOC	FL ST. AUGUSTINE	29-51-00N	81-19-45W
163	NONE	1410	WHBT	FL TALLAHASSEE	30-29-35N	84-17-00W
164	NONE	1110	WTIS	FL TAMPA	27-52-26N	82-37-53W
165	NONE	1550	WAMA	FL TAMPA	27-55-16N	82-23-41W

Rank	IF	Allot	Freq.	Call	Location	Coordinates	
166		NONE	1600	WAOS	GA AUSTELL	33-48-34N	84-39-25W
167		NONE	990	WHIA	GA DAWSON	31-48-35N	84-27-45W
168		NONE	1520	WKVQ	GA EATONTON	33-19-19N	83-25-03W
169		NONE	1130	WLBA	GA GAINESVILLE	34-16-45N	83-46-33W
170		NONE	1600	WNGA	GA NASHVILLE	31-12-07N	83-13-18W
171		NONE	980	WLMX	GA ROSSVILLE	34-58-03N	85-18-00W
172		NONE	1310	WBRO	GA WAYNESBORO	33-06-14N	81-59-11W
173		NONE	1580	KFQC	IA DAVENPORT	41-34-15N	90-34-53W
174		NONE	1580	WKKD	IL AURORA	41-46-12N	88-16-03W
175		NONE	790	WRMS	IL BEARDSTOWN	40-00-13N	90-23-49W
176		NONE	1460	WIXN	IL DIXON	41-49-38N	89-29-11W
177		NONE	1330	WKTA	IL EVANSTON	42-08-23N	87-53-09W
178		NONE	1520	WLUV	IL LOVES PARK	42-19-48N	89-04-58W
179		NONE	1140	WVEL	IL PEKIN	40-36-08N	89-37-32W
180		NONE	1020	WPEO	IL PEORIA	40-41-53N	89-31-31W
181		NONE	1560	WSHY	IL SHELBYVILLE	39-24-05N	88-49-00W
182		NONE	1030	WNVR	IL VERNON HILLS	42-12-40N	87-57-41W
183		NONE	1220	WKRS	IL WAUKEGAN	42-20-59N	87-52-53W
184		NONE	1500	WBRI	IN INDIANAPOLIS	39-52-14N	86-05-17W
185		NONE	1560	WSEZ	IN PAOLI	38-32-25N	86-28-42W
186		NONE	1560	WRIN	IN RENSSELAER	40-57-41N	87-09-07W
187		NONE	1350	KMAN	KS MANHATTAN	39-13-00N	96-33-30W
188		NONE	1130	WKED	KY FRANKFORT	38-12-13N	84-54-51W
189		NONE	1170	WDFB	KY JUNCTION CITY	37-35-46N	84-50-19W
190		NONE	680	WLSY	KY NEWBURG	38-05-31N	85-40-56W
191		1640	600	WVOG	LA NEW ORLEANS	29-57-25N	90-09-33W
192		1660	1510	KAGY	LA PORT SULPHUR	29-29-03N	89-42-15W
193		1650	1270	KVCL	LA WINNFIELD	31-56-58N	92-37-37W
194		NONE	950	WROL	MA BOSTON	42-26-15N	70-59-40W
195		NONE	830	WCRN	MA CHERRY VALLEY	42-14-47N	71-55-51W
196		NONE	730	WACE	MA CHICOPEE	42-10-02N	72-37-31W
197		NONE	800	WCCM	MA LAWRENCE	42-40-26N	71-11-26W
198		NONE	1110	WUHN	MA PITTSFIELD	42-26-22N	73-17-30W
199		NONE	810	WYRE	MD ANNAPOLIS	38-58-13N	76-30-28W
200		NONE	1190	WANN	MD ANNAPOLIS	38-56-33N	76-28-53W
201		NONE	1010	WYST	MD BALTIMORE	39-16-38N	76-37-59W
202		NONE	1520	WHRF	MD BEL AIR	39-34-18N	76-26-57W
203		NONE	1320	WICO	MD SALISBURY	38-21-39N	75-37-00W
204		1620	790	WRUM	ME RUMFORD	44-30-53N	70-31-01W
205		NONE	1060	WHFB	MI BENTON HARBOR-ST.	42-04-44N	86-28-00W
206		NONE	1180	WXLA	MI DIMONDALE	42-39-01N	84-34-49W
207		NONE	730	WVIC	MI EAST LANSING	42-38-45N	84-33-39W
208		NONE	1350	WHMI	MI HOWELL	42-36-09N	83-59-18W
209		NONE	1510	WJCO	MI JACKSON	42-11-10N	84-22-39W
210		1620	1090	KJJK	MN FERGUS FALLS	46-14-43N	95-58-46W
211		1690	1460	KDWA	MN HASTINGS	44-42-49N	92-50-30W
212		NONE	770	KUOM	MN MINNEAPOLIS	44-42-52N	93-03-39W
213		1640	1080	KYMN	MN NORTHFIELD	44-29-12N	93-06-20W
214		NONE	1520	KOLM	MN ROCHESTER	43-59-13N	92-25-05W
215		NONE	1420	KZMO	MO CALIFORNIA	38-38-12N	92-35-00W
216		NONE	1580	KTGR	MO COLUMBIA	38-58-01N	92-18-39W
217		NONE	1140	KLTK	MO SOUTHWEST CITY	36-30-28N	94-36-35W
218		NONE	1470	WVBS	NC BURGAW	34-32-05N	77-54-31W
219		NONE	1180	WMYT	NC CAROLINA BEACH	34-09-03N	78-04-48W
220		NONE	1460	WNBR	NC FUQUAY-VARINA	35-36-37N	78-48-14W
221		NONE	1300	WFXN	NC GOLDSBORO	35-24-08N	78-01-20W
222		NONE	570	WLLE	NC RALEIGH	35-45-37N	78-39-27W
223		1650	1330	KDRQ	ND WISHEK	46-15-02N	99-30-17W
224		NONE	1600	KNCY	NE NEBRASKA CITY	40-40-27N	95-53-08W
225		1630	1600	KRFS	NE SUPERIOR	40-01-30N	98-04-38W

Rank	IF	Allot	Freq.	Call	Location	Coordinates	
226		NONE	1410	WHTG	NJ EATONTOWN	40-16-10N	74-04-19W
227		NONE	1000	WRNJ	NJ HACKETTSTOWN	40-50-47N	74-48-16W
228		NONE	1440	WREY	NJ MILLVILLE	39-25-19N	75-01-14W
229		NONE	1360	WNNJ	NJ NEWTON	41-02-22N	74-44-19W
230		NONE	1520	WIBG	NJ OCEAN CITY - SOME	39-19-05N	74-37-09W
231		NONE	1550	WNJO	NJ TOMS RIVER	39-59-15N	74-16-07W
232		1700	1580	KZKL	NM ALBUQUERQUE	35-10-14N	106-37-51W
233		NONE	1000	KKIM	NM ALBUQUERQUE	35-10-14N	106-37-51W
234		NONE	1080	WUFO	NY AMHERST	42-56-46N	78-49-43W
235		NONE	1120	WHTT	NY BUFFALO	42-49-50N	78-47-54W
236		NONE	1190	WSCM	NY COBLESKILL	42-41-26N	74-26-40W
237		NONE	1170	WARW	NY CORNWALL	41-26-24N	74-04-25W
238		NONE	1100	WHLI	NY HEMPSTEAD	40-41-06N	73-36-38W
239		NONE	1000	WLNL	NY HORSEHEADS	42-09-14N	76-50-47W
240		1610	1050	WYBG	NY MASSENA	44-53-42N	74-56-05W
241		NONE	1520	WTHE	NY MINEOLA	40-44-45N	73-37-29W
242		NONE	1220	WGNY	NY NEWBURGH	41-32-07N	74-06-41W
243		NONE	730	WDOS	NY ONEONTA	42-27-29N	75-00-20W
244		NONE	1410	WSTL	NY SOUTH GLENS FALLS	43-16-07N	73-40-14W
245		NONE	1330	WHAZ	NY TROY	42-46-35N	73-41-10W
246		NONE	970	WATH	OH ATHENS	39-20-40N	82-06-21W
247		NONE	1290	WOMP	OH BELLAIRE	40-02-09N	80-46-16W
248		NONE	1520	WINW	OH CANTON	40-50-41N	81-21-02W
249		NONE	820	WOSU	OH COLUMBUS	40-01-44N	83-03-22W
250		NONE	1300	WMVO	OH MOUNT VERNON	40-24-17N	82-26-23W
251		NONE	1510	WVAC	OH NORWALK	41-16-45N	82-39-23W
252		NONE	1000	WCCD	OH PARMA	41-19-11N	81-46-07W
253		NONE	1330	WELW	OH WILLOUGHBY	41-38-56N	81-25-19W
254		NONE	750	KSEO	OK DURANT	34-00-07N	96-25-19W
255		NONE	1570	KMYZ	OK PRYOR	36-18-04N	95-19-29W
256		1670	630	KWRO	OR COQUILLE	43-10-17N	124-11-54W
257		NONE	1600	WAYC	PA BEDFORD	40-00-45N	78-29-54W
258		NONE	970	WBLF	PA BELLEFONTE	40-54-12N	77-46-06W
259		NONE	1590	WPLW	PA CARNEGIE	40-25-40N	80-05-09W
260		NONE	940	WESA	PA CHARLEROI	40-07-24N	79-53-45W
261		NONE	1010	WTGC	PA LEWISBURG	40-56-40N	76-52-45W
262		NONE	1540	WPGR	PA PHILADELPHIA	40-02-46N	75-14-15W
263		NONE	1080	WEEP	PA PITTSBURGH	40-36-17N	79-57-37W
264		NONE	860	WYJZ	PA PITTSBURGH	40-29-27N	79-58-55W
265		NONE	730	WPIT	PA PITTSBURGH	40-29-02N	79-59-34W
266		NONE	1540	WECZ	PA PUNXSUTAWNEY	40-57-36N	79-00-08W
267		NONE	630	WEJL	PA SCRANTON	41-24-35N	75-40-01W
268		NONE	1380	WAYZ	PA WAYNESBORO	39-44-20N	77-36-10W
269		NONE	1220	WRIB	RI PROVIDENCE	41-49-15N	71-23-07W
270		NONE	960	WBEU	SC BEAUFORT	32-26-18N	80-42-38W
271		NONE	1410	WPCC	SC CLINTON	34-26-42N	81-53-24W
272		NONE	1370	WMNY	SC ELLOREE-SANTEE	33-30-07N	80-32-14W
273		NONE	1500	WEAC	SC GAFFNEY	35-05-18N	81-38-40W
274		NONE	950	WMCJ	SC MONCKS CORNER	33-12-18N	80-03-11W
275		NONE	1520	WKZQ	SC MYRTLE BEACH	33-42-20N	78-53-23W
276		NONE	1380	WGUS	SC NORTH AUGUSTA	33-29-17N	81-56-46W
277		NONE	1600	WKZK	SC NORTH AUGUSTA	33-29-37N	81-59-52W
278		1700	1570	KOSZ	SD VERMILLION	42-47-32N	97-00-03W
279		NONE	1200	WQDQ	TN LEBANON	36-11-42N	86-17-26W
280		NONE	1040	WQBB	TN POWELL	36-02-34N	84-02-51W
281		NONE	1090	KACO	TX BELLVILLE	29-56-50N	96-15-54W
282		NONE	1280	KTTX	TX BRENHAM	30-10-05N	96-25-20W
283		NONE	1120	KCLE	TX CLEBURNE	32-23-05N	97-23-46W
284		NONE	650	KIKK	TX PASADENA	29-41-18N	95-10-29W
285		NONE	980	KMPQ	TX ROSENBERG-RICHMON	29-33-10N	95-47-00W

Rank	IF	Allot	Freq.	Call	Location	Coordinates
286		NONE	1410	KBAL	TX SAN SABA	31-11-26N 98-42-55W
287		NONE	1390	KBEC	TX WAXAHACHIE	32-25-30N 96-51-56W
288		NONE	1220	KZEE	TX WEATHERFORD	32-47-09N 97-47-55W
289		NONE	1420	WAMV	VA AMHERST	37-32-23N 79-05-30W
290		NONE	780	WABS	VA ARLINGTON	38-53-44N 77-08-04W
291		NONE	1170	WVZN	VA LYNCHBURG	37-27-50N 79-07-23W
292		NONE	1590	WFTH	VA RICHMOND	37-30-02N 77-27-28W
293		NONE	1540	WRBN	VA RICHMOND	37-37-08N 77-25-27W
294		NONE	1550	WKBA	VA VINTON	37-17-24N 79-55-22W
295		1610	1280	KUDY	WA SPOKANE	47-36-27N 117-21-40W
296		NONE	1560	KZIZ	WA SUMNER	47-12-48N 122-13-25W
297		NONE	1530	WMBE	WI CHILTON	44-01-10N 88-09-32W
298		NONE	1550	WHIT	WI MADISON	43-00-08N 89-23-08W
299		NONE	1590	WCAE	WI NEKOOSA	44-16-05N 89-57-35W
300		NONE	740	WRNR	WV MARTINSBURG	39-28-25N 77-55-57W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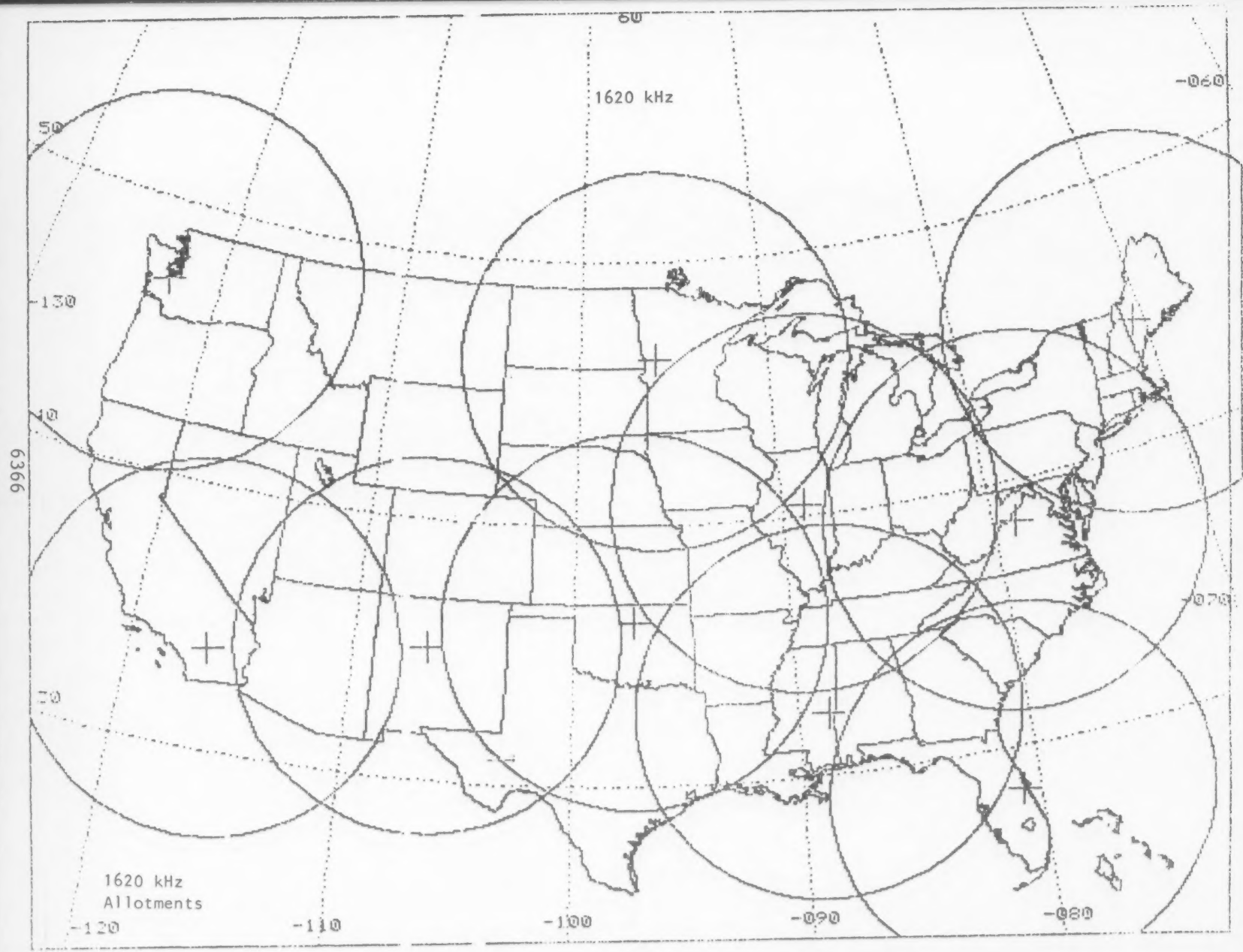
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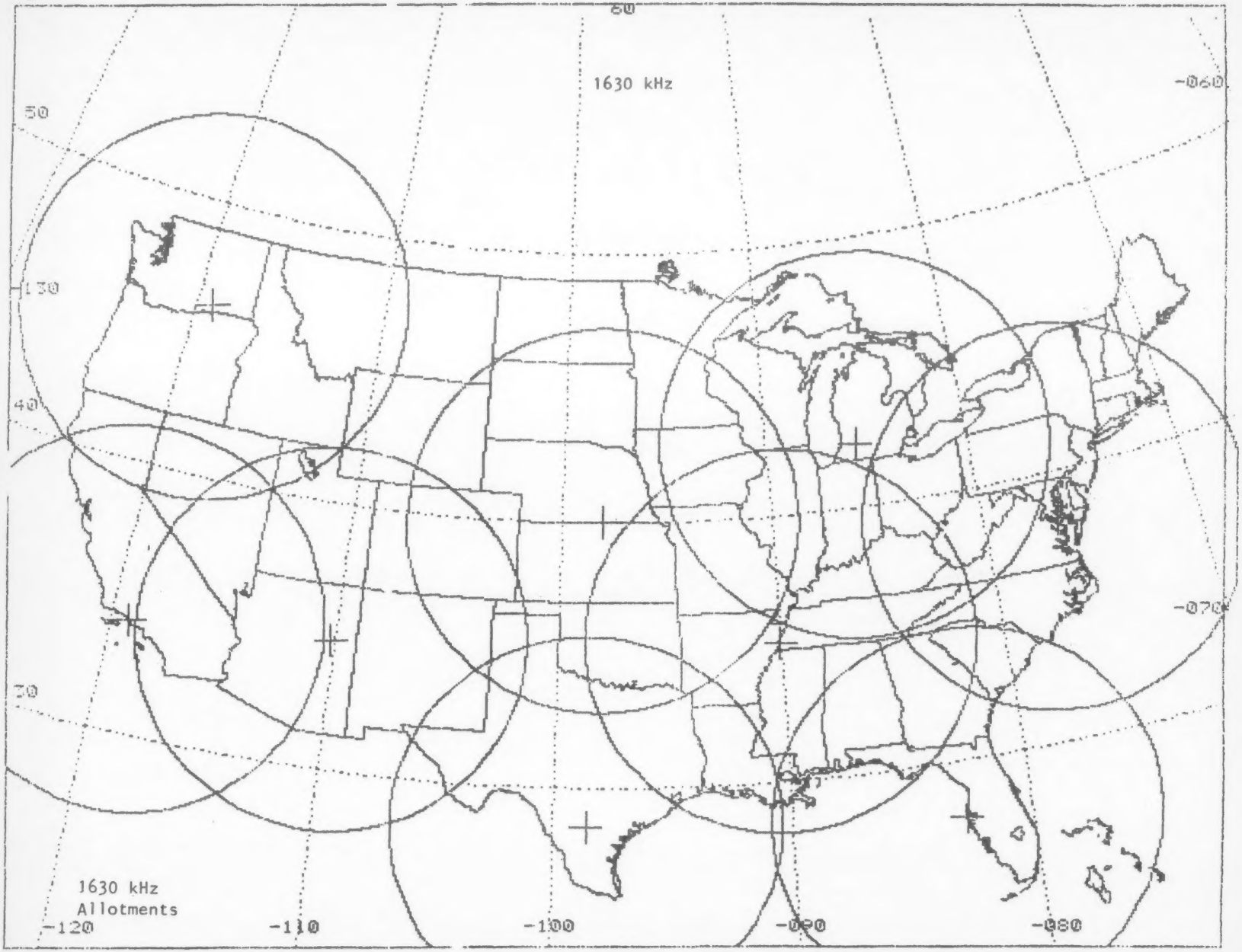
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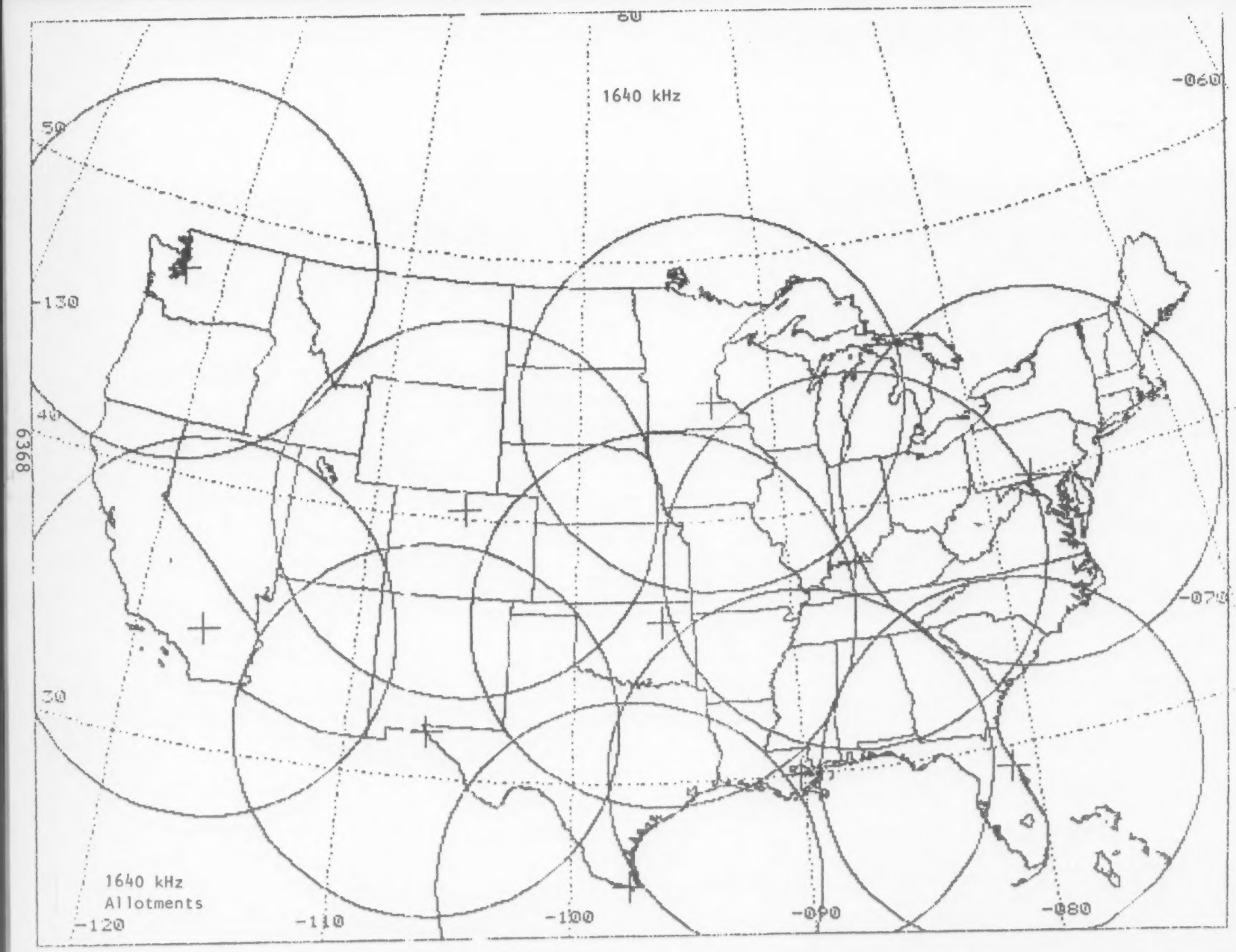
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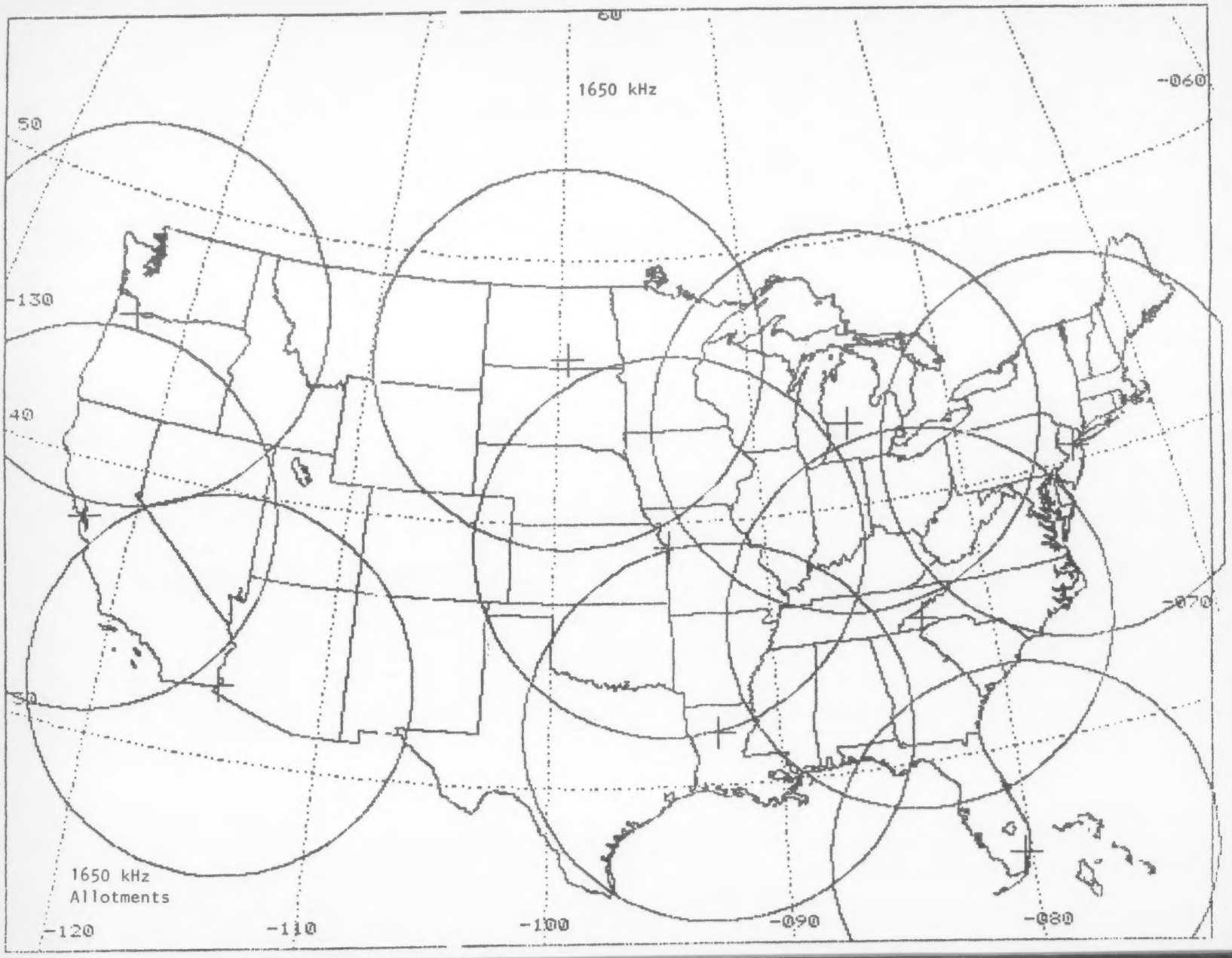
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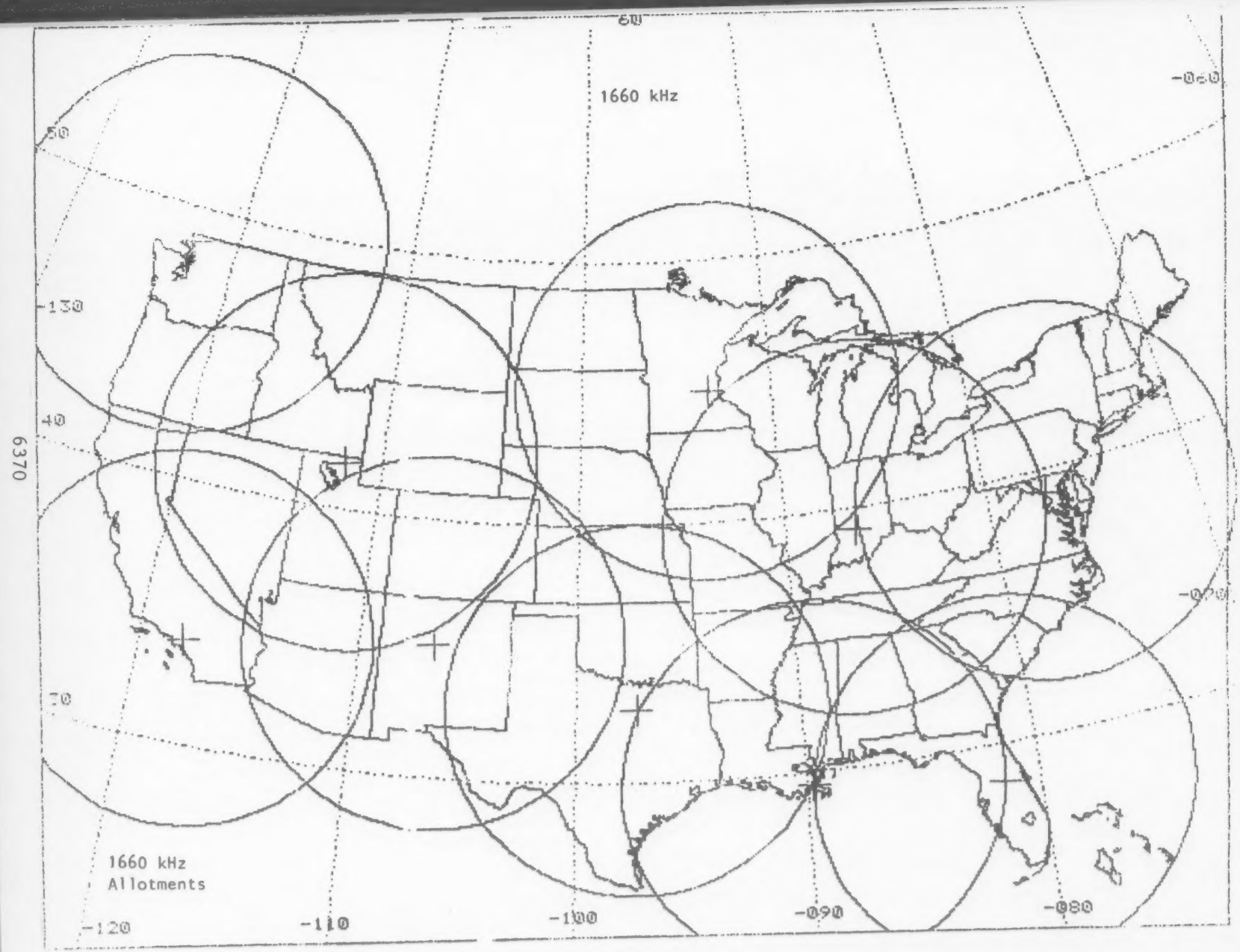
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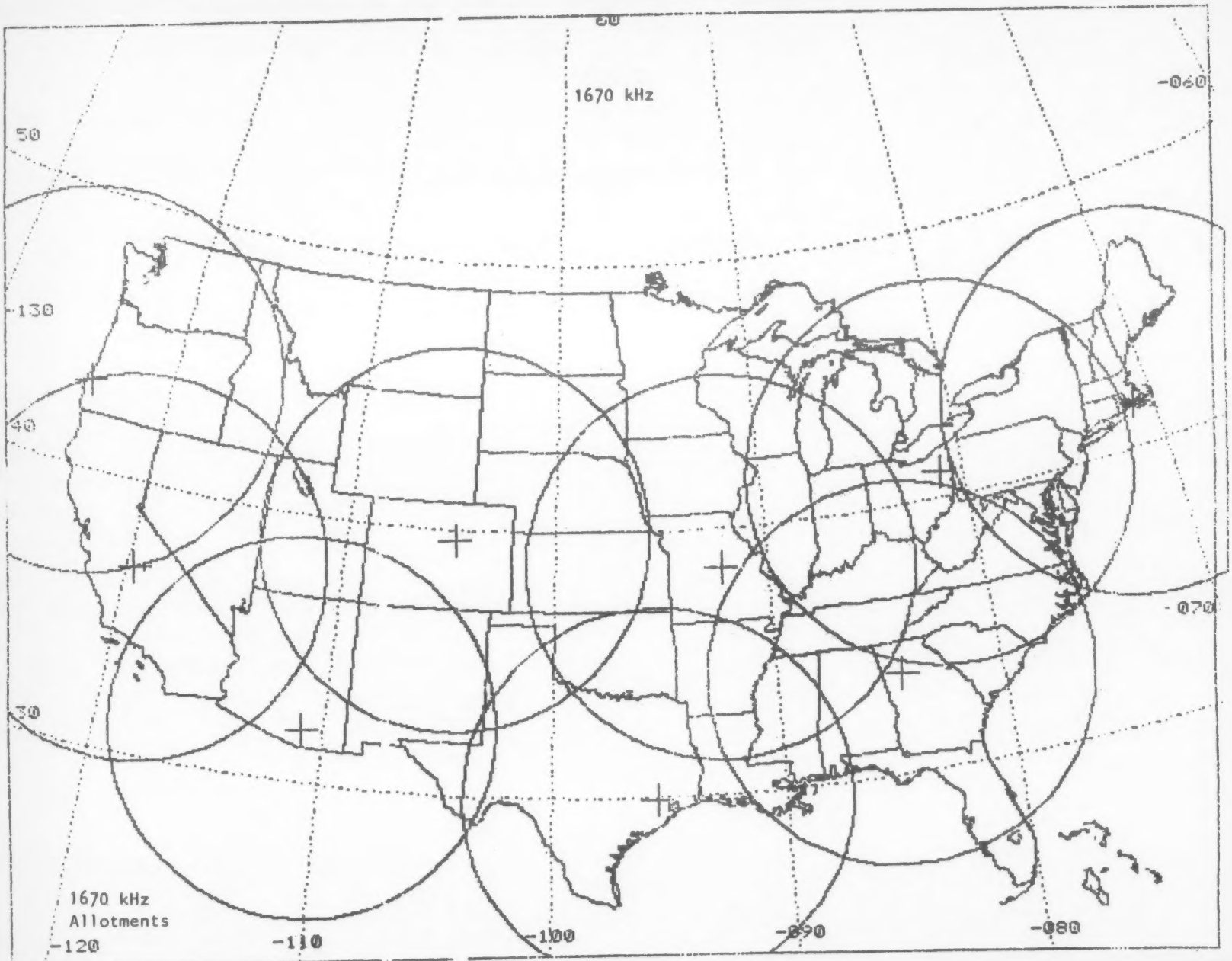
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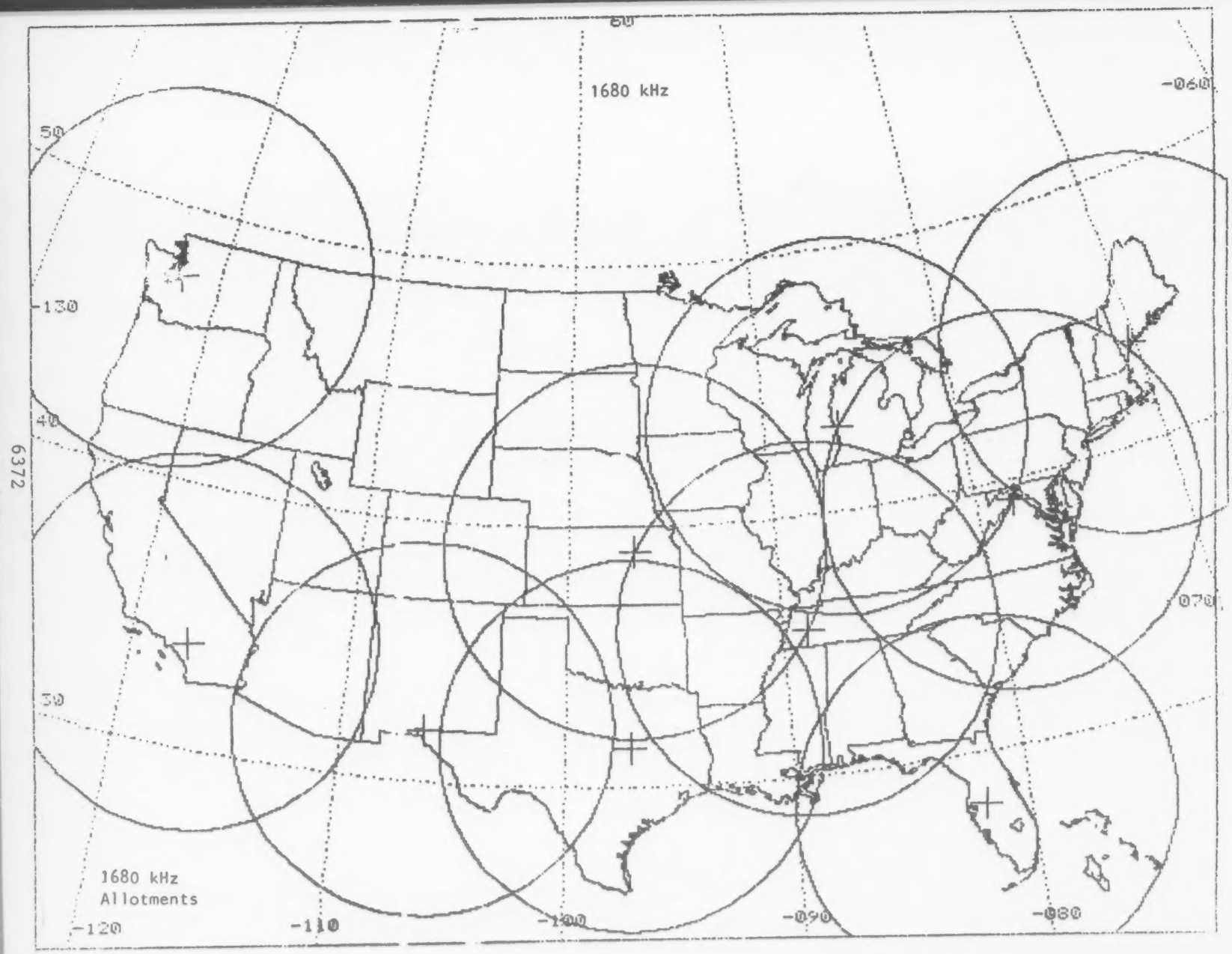
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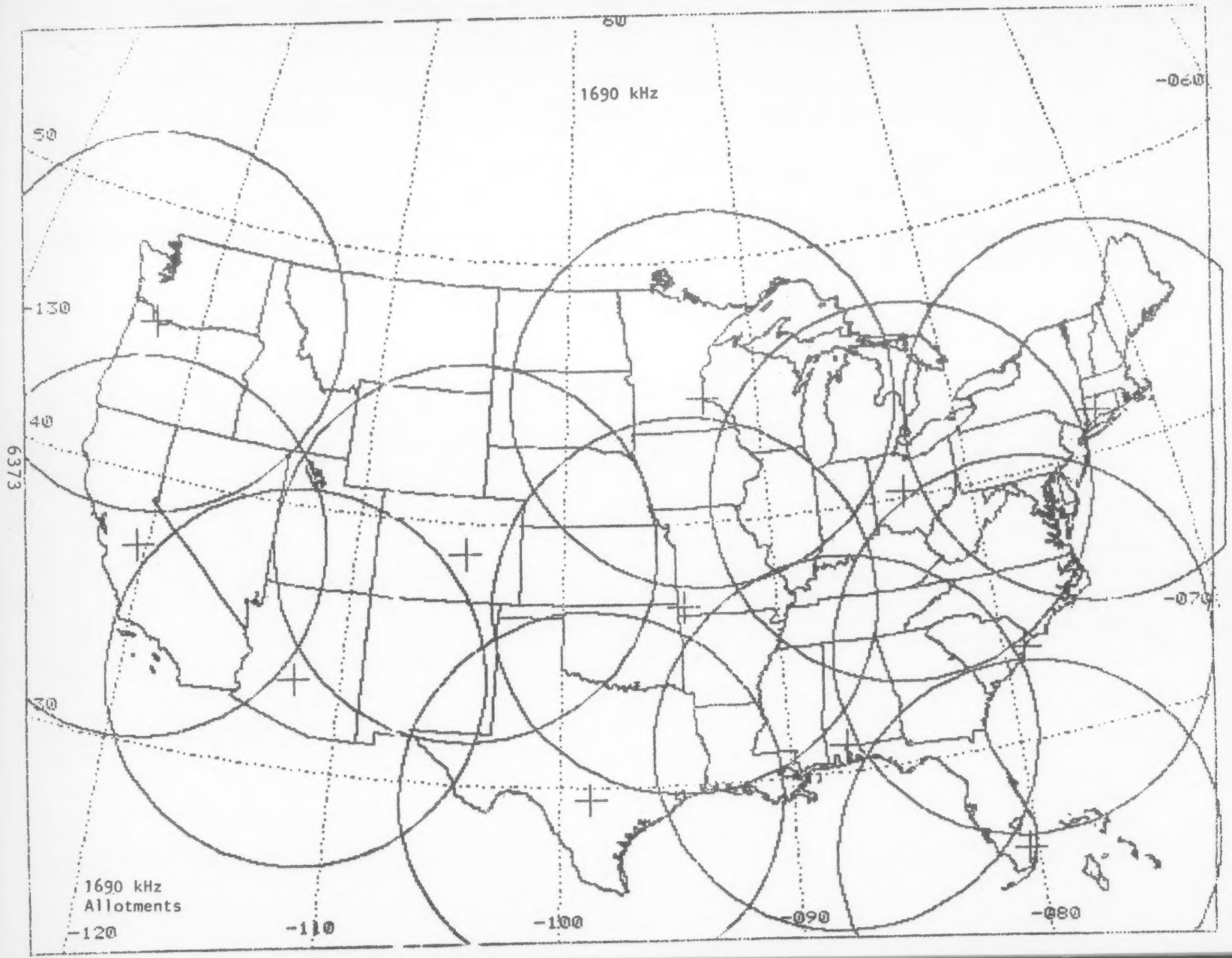
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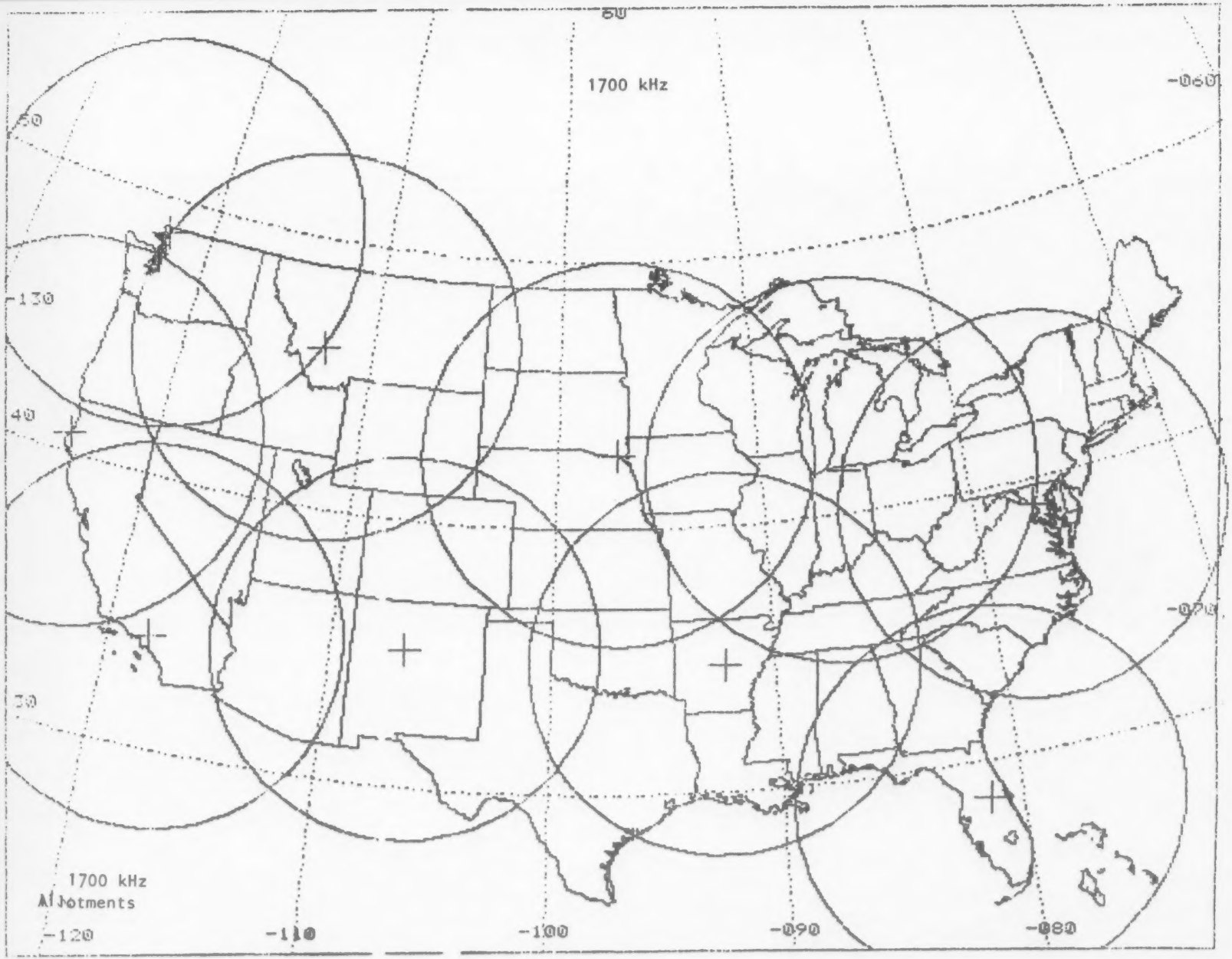
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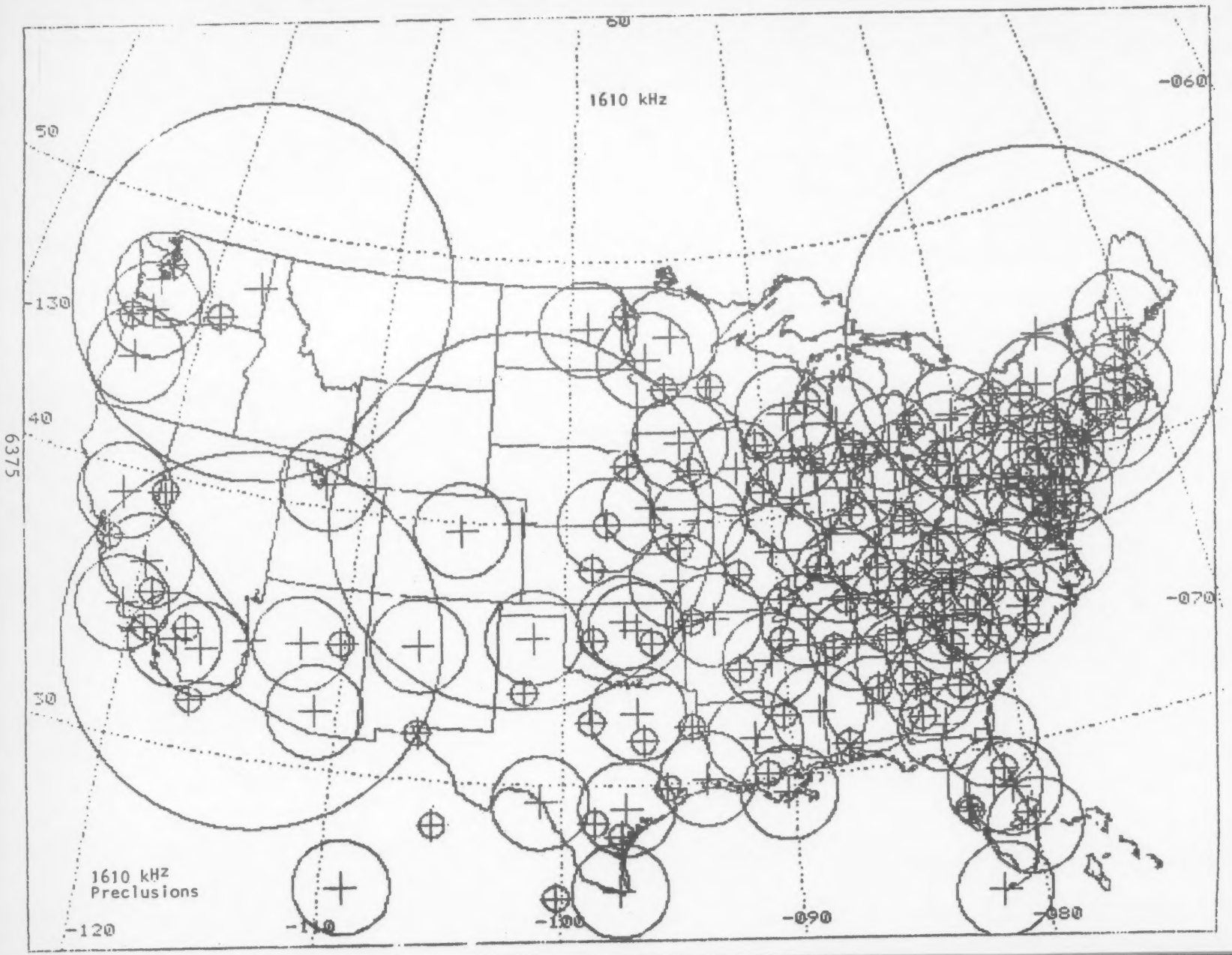
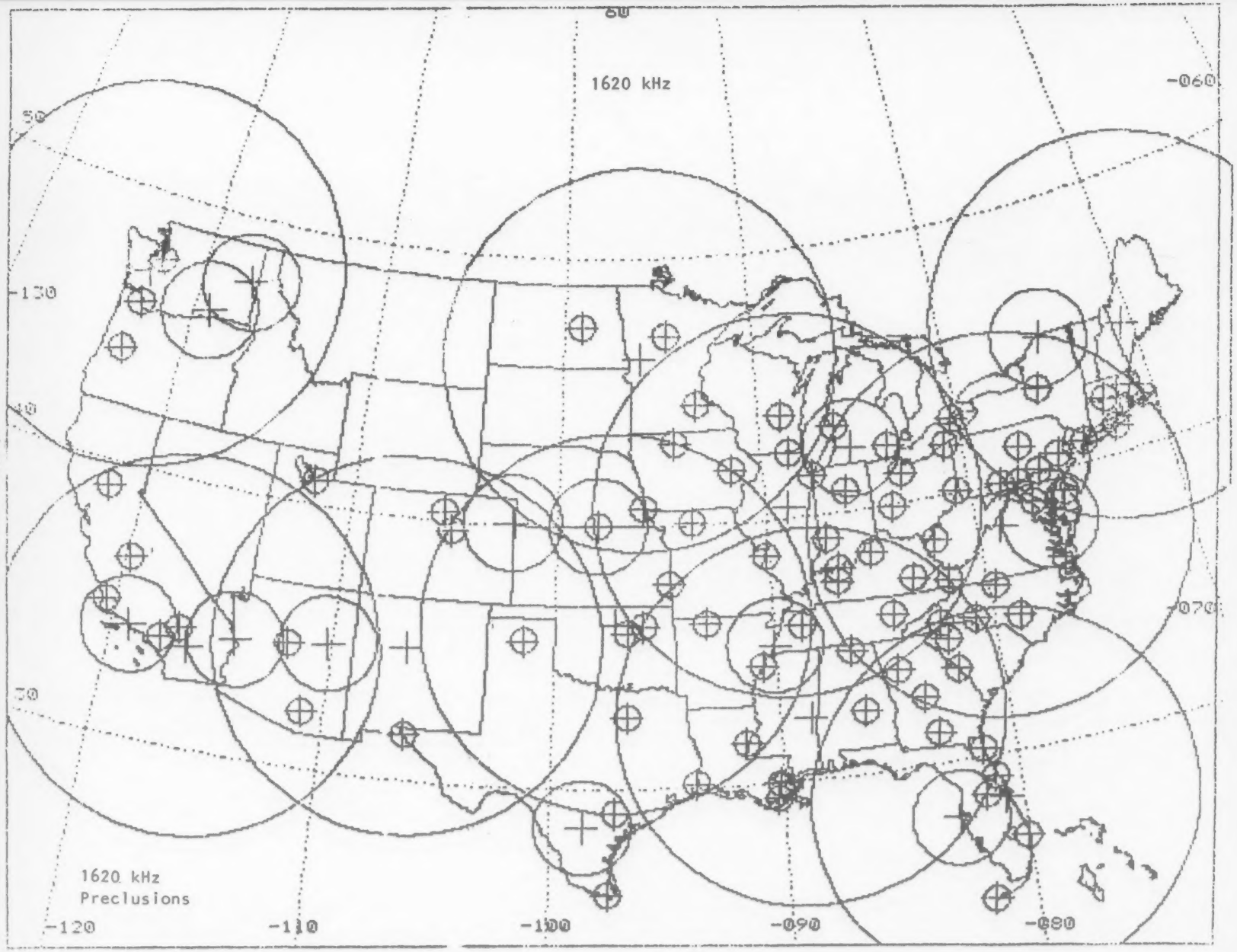
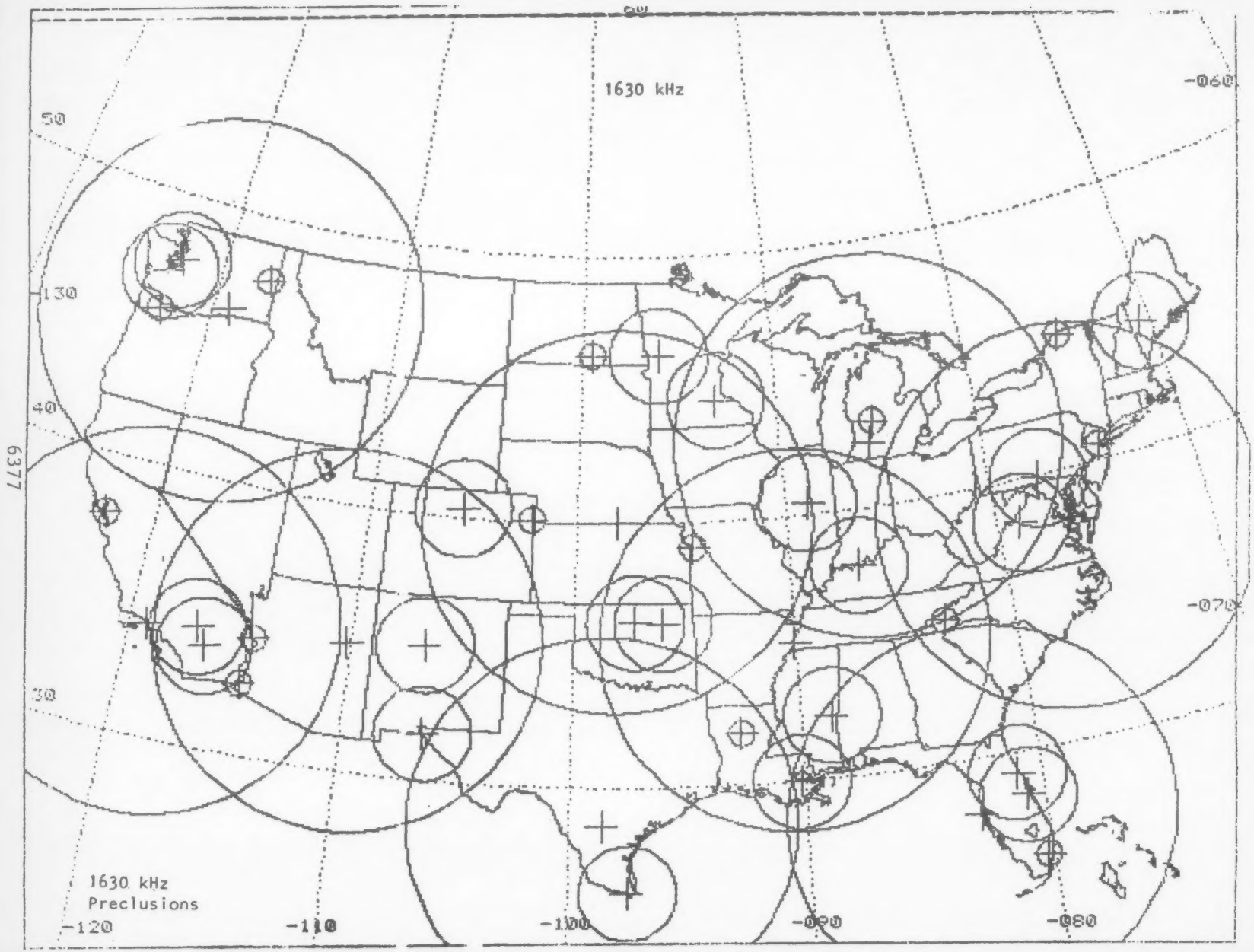
6374


1610 kHz
1610 kHz
Preclusions
60
50
40
30
-060
-070
-080
-090
-100
-110
-120
-130

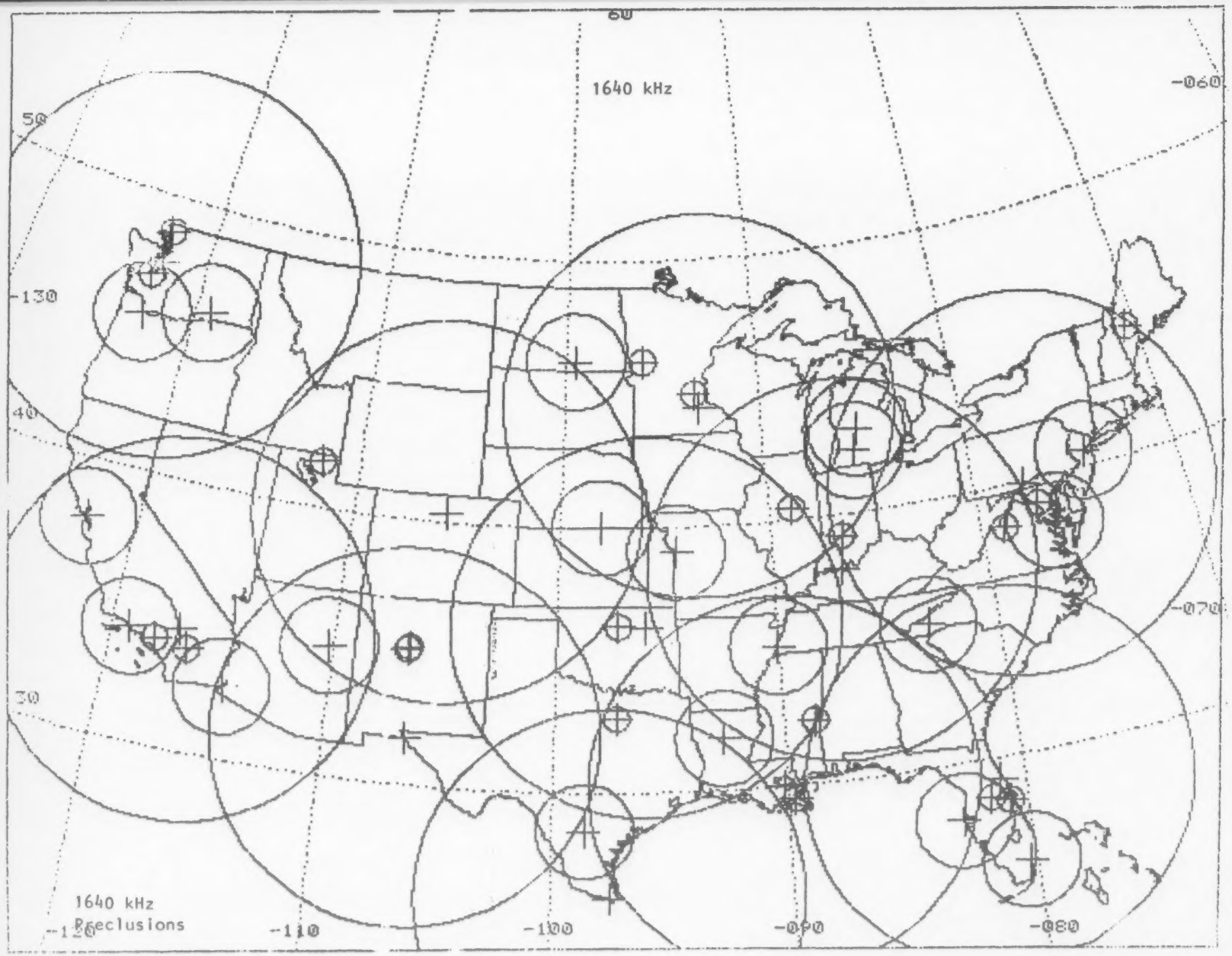
6375

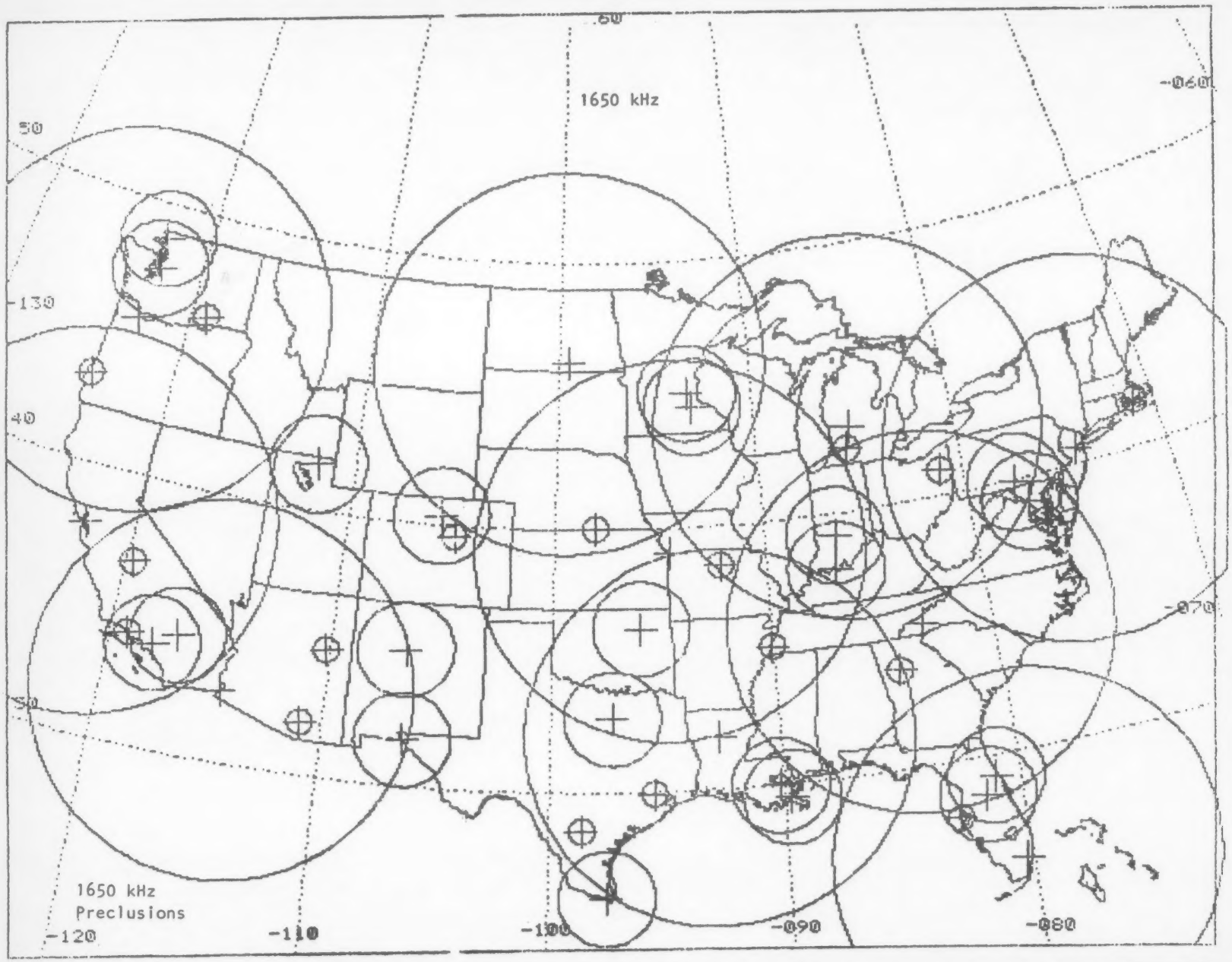

1620 kHz
1620 kHz
Preclusions
-060
-070
-080
-090
-100
-110
-120
-130
50
40
30

6376

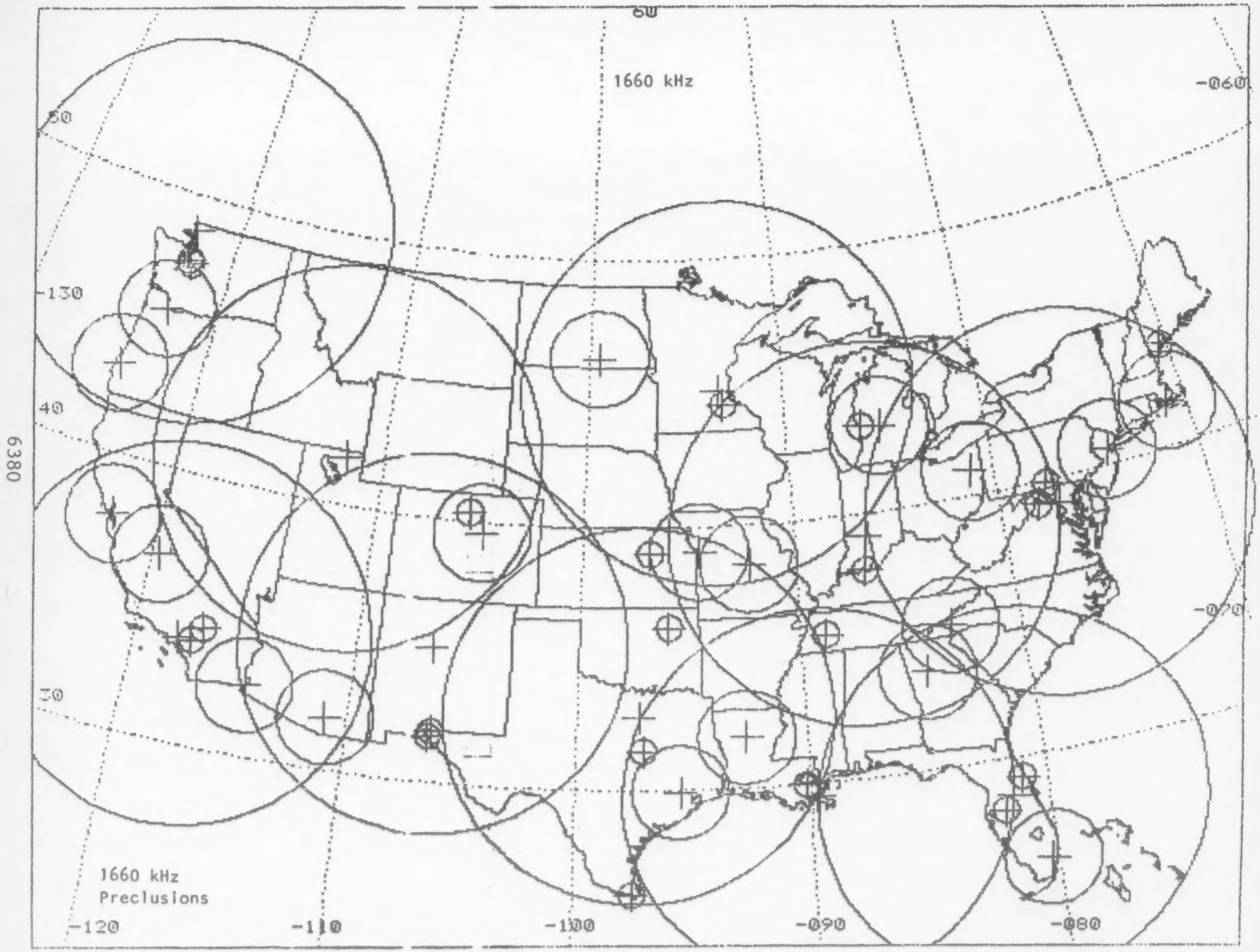

1630 kHz
50
130
40
30
-060
-070
-080
-090
-100
-110
-120
1630 kHz
Preclusions

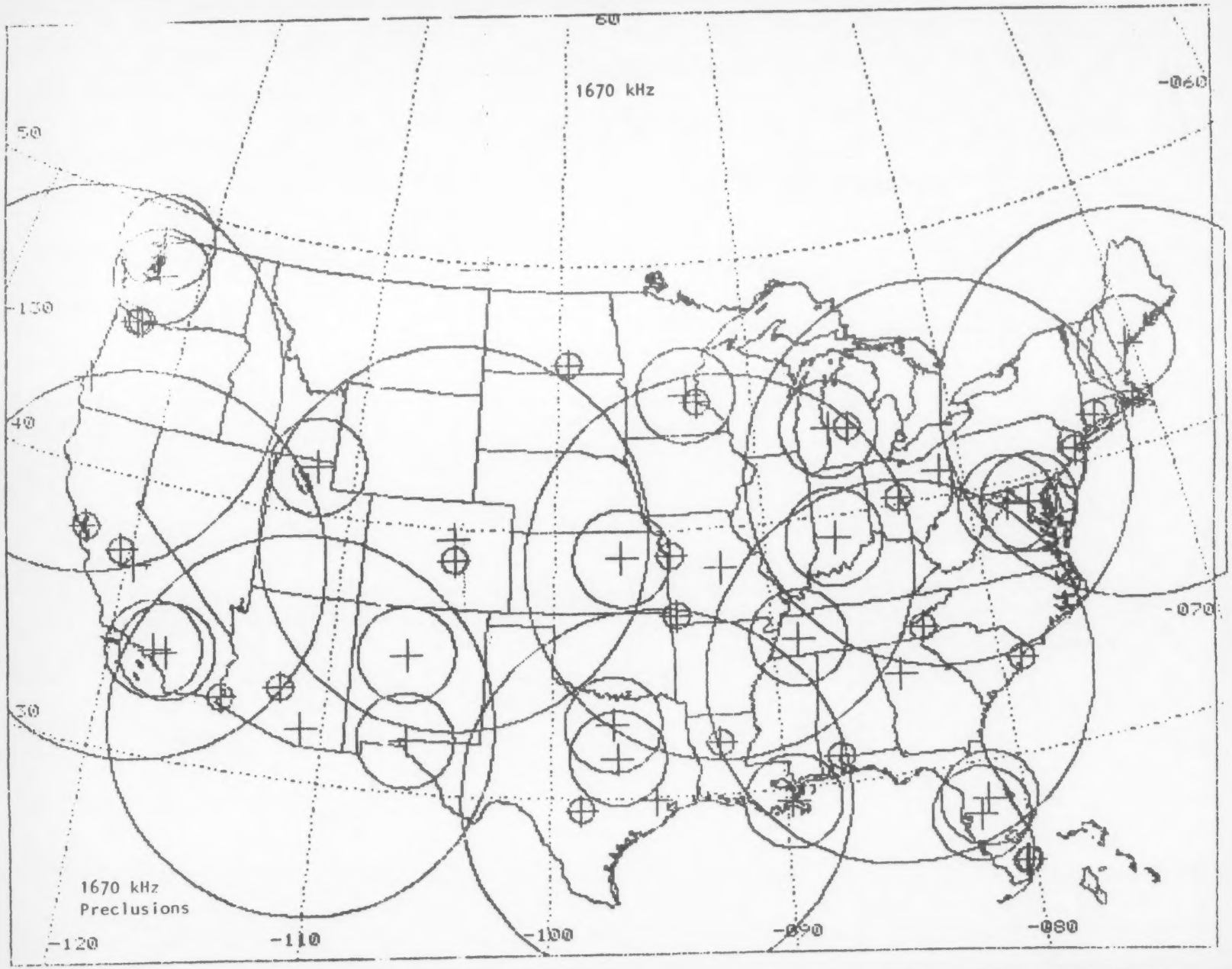
6377


1640 kHz
1640 kHz
Preclusions
60
50
40
30
-060
-070
-080
-090
-100
-110
-120
-130
6378

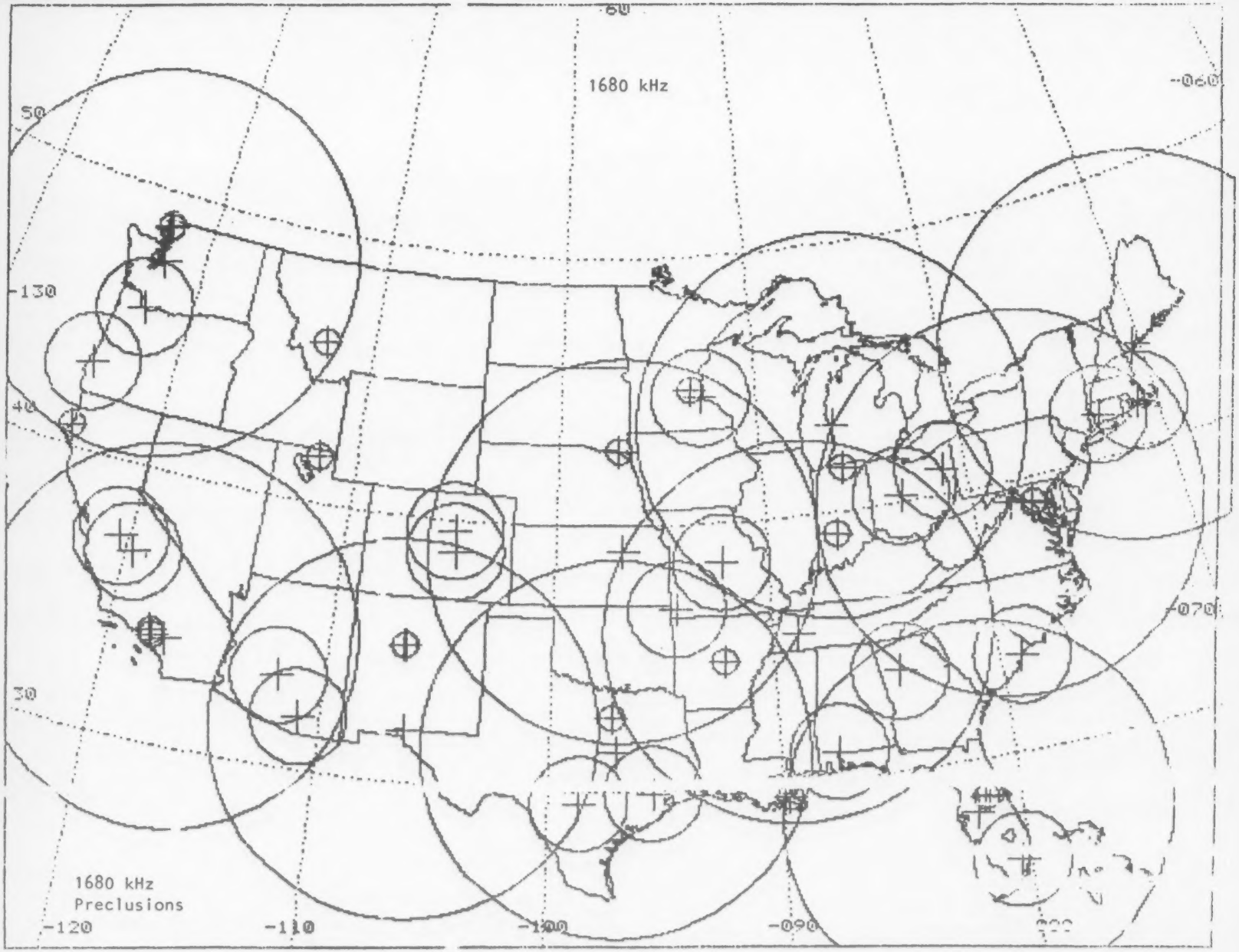

1650 kHz
1650 kHz
Preclusions
-120
-110
-100
-090
-080
-070
-060
50
40
30
-130

6379

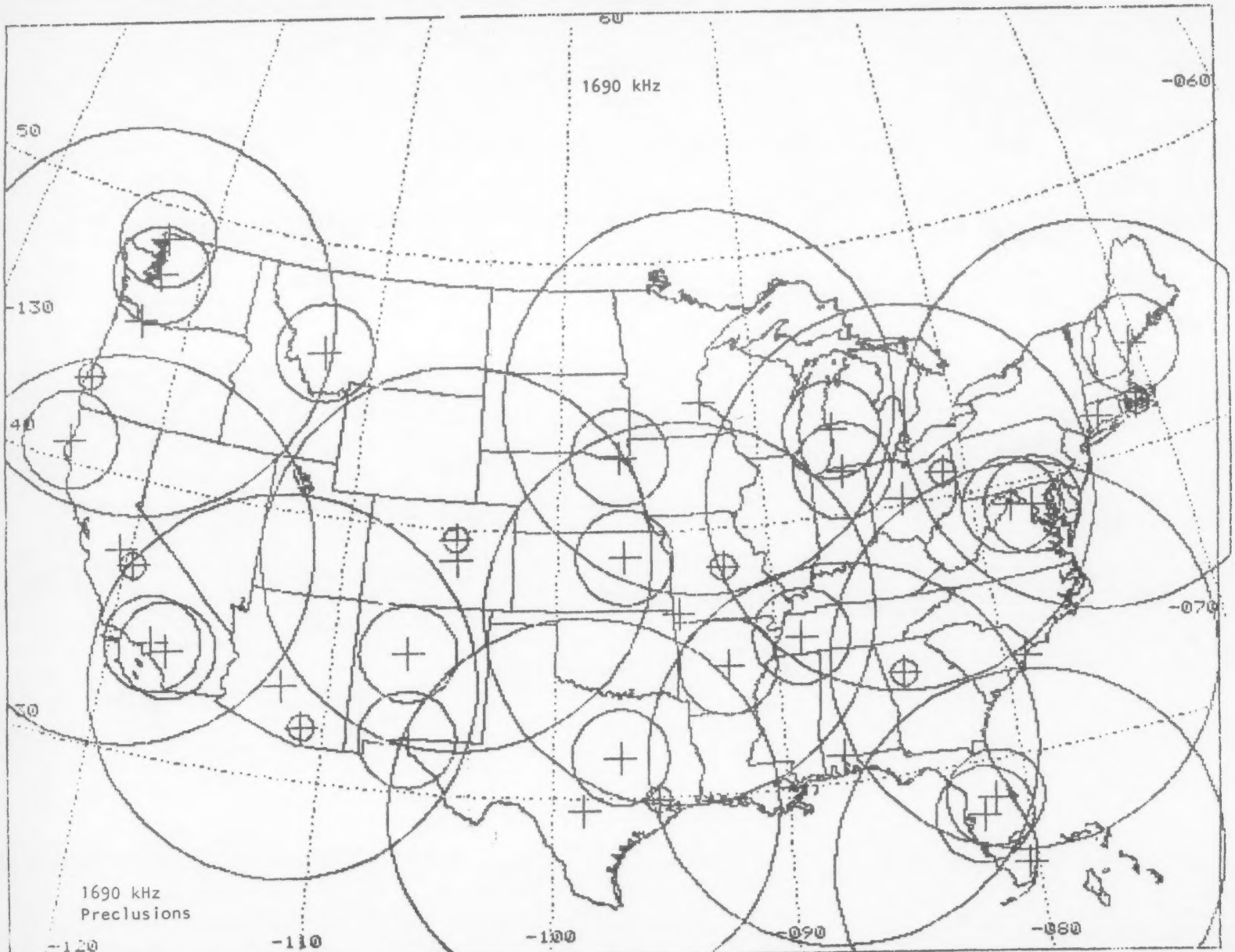

1660 kHz
1660 kHz
Preclusions
50
40
30
-130
-120
-110
-100
-090
-080
-060
-070
6380


1670 kHz
60
50
40
30
-060
-070
-080
-090
-100
-110
-120
1670 kHz
Preclusions

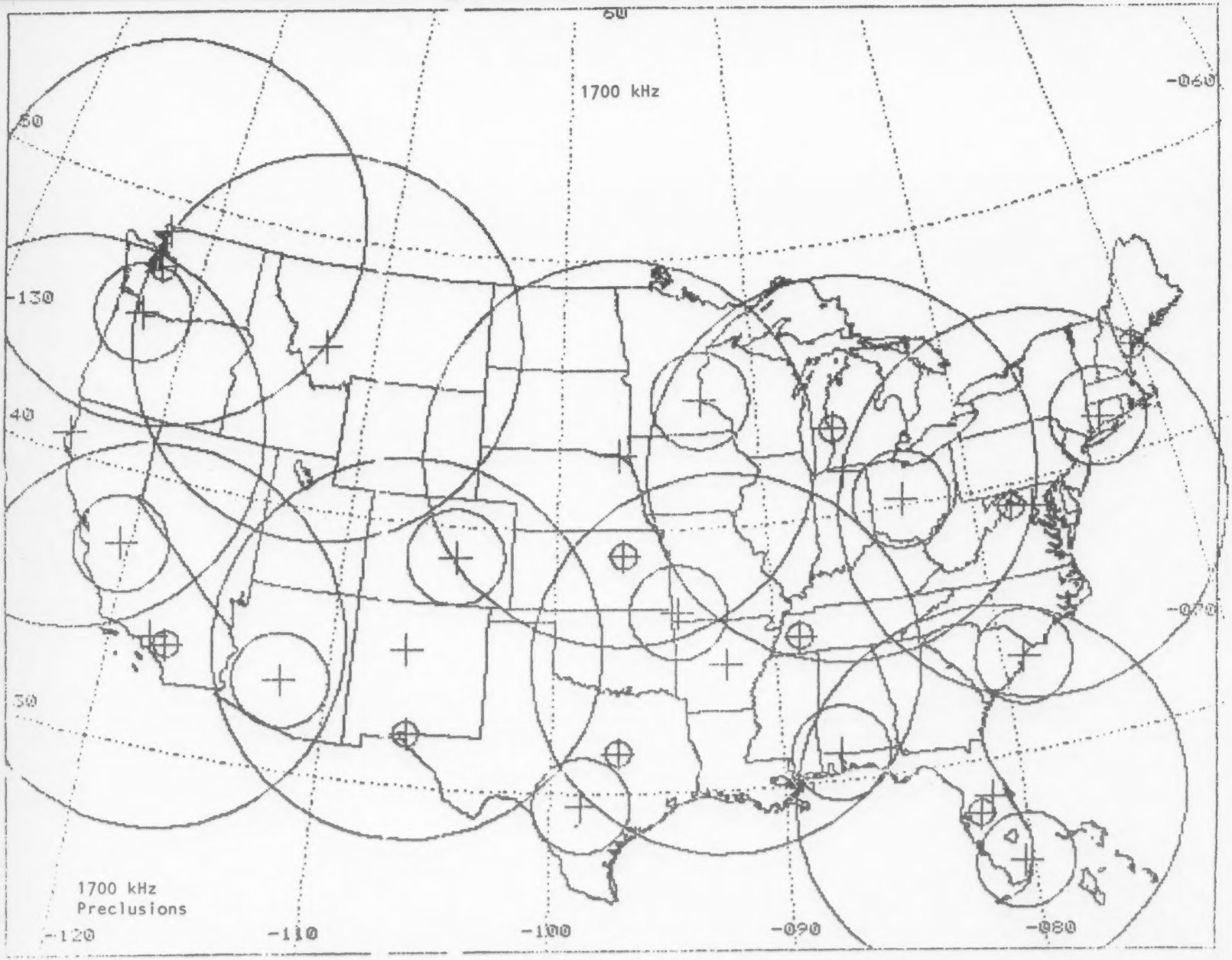
6381


1680 kHz
1680 kHz
Preclusions
60
50
40
30
-130
-120
-110
-100
-090
-070
-060

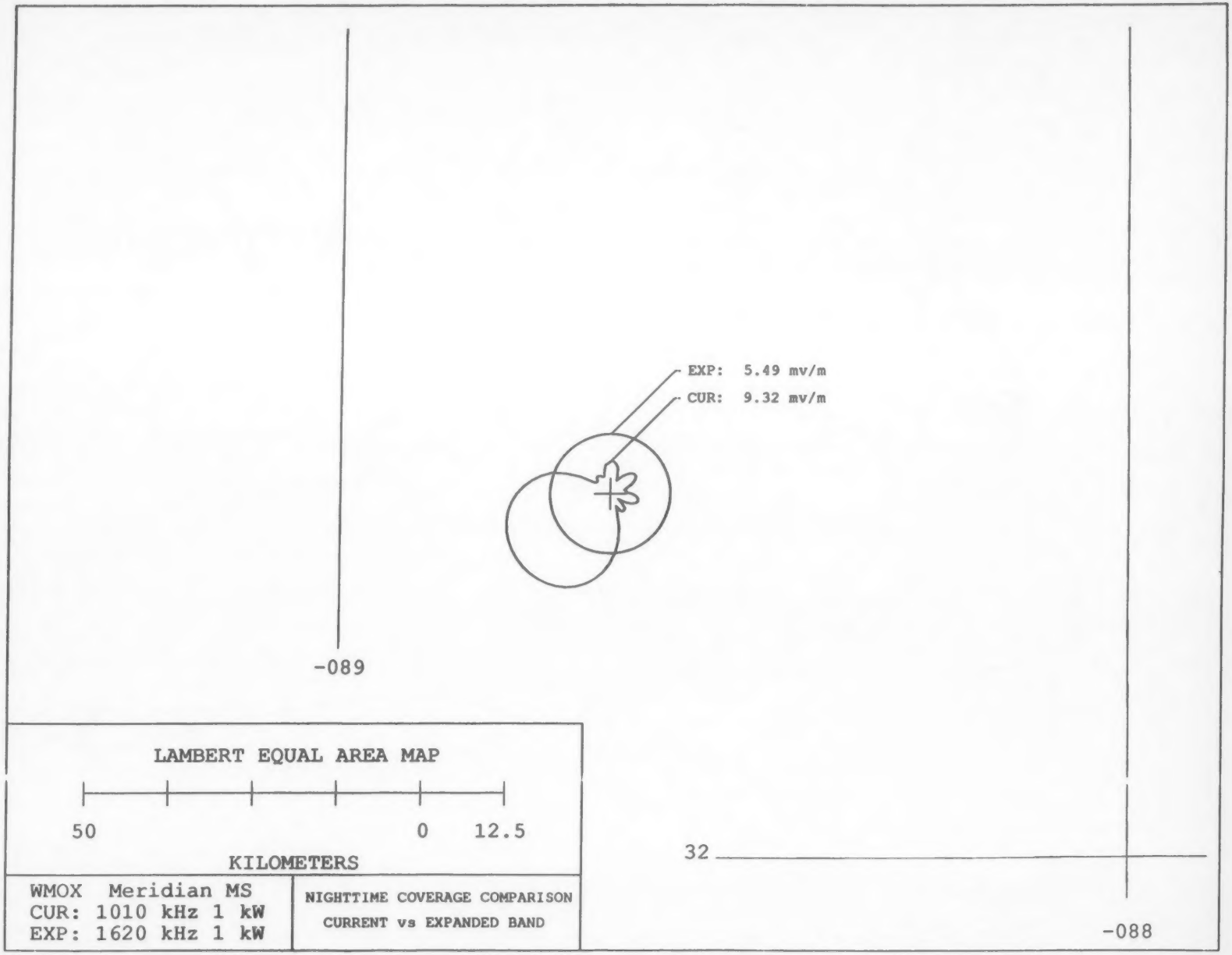
6382


1690 kHz
1690 kHz
Preclusions
50
-130
40
-120
-110
-100
-090
-080
-070
-060

6383


1700 kHz
1700 kHz
Preclusions
50
-060
50
-130
40
30
-120
-110
-100
-090
-080
-070
6384

6385

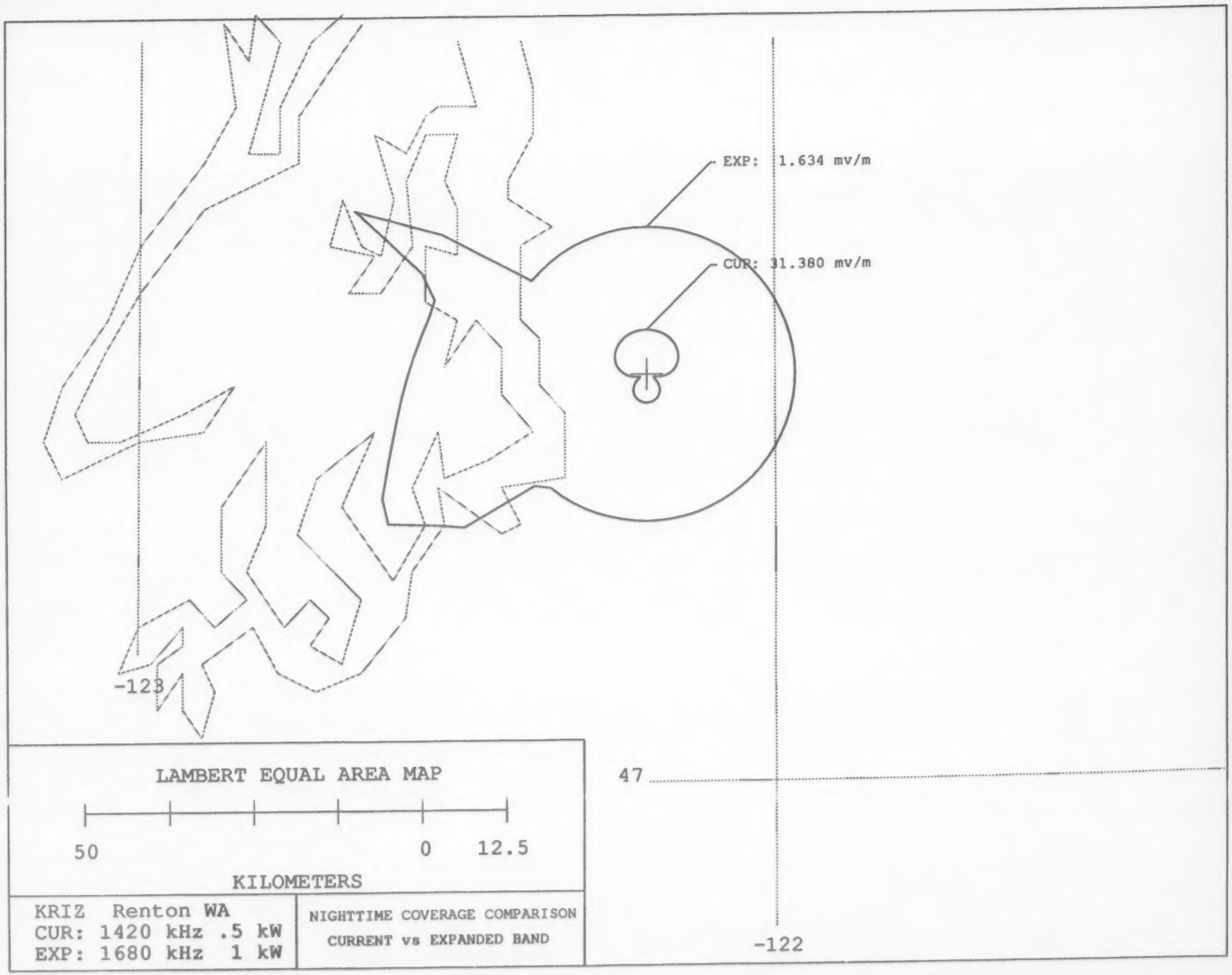


LAMBERT EQUAL AREA MAP

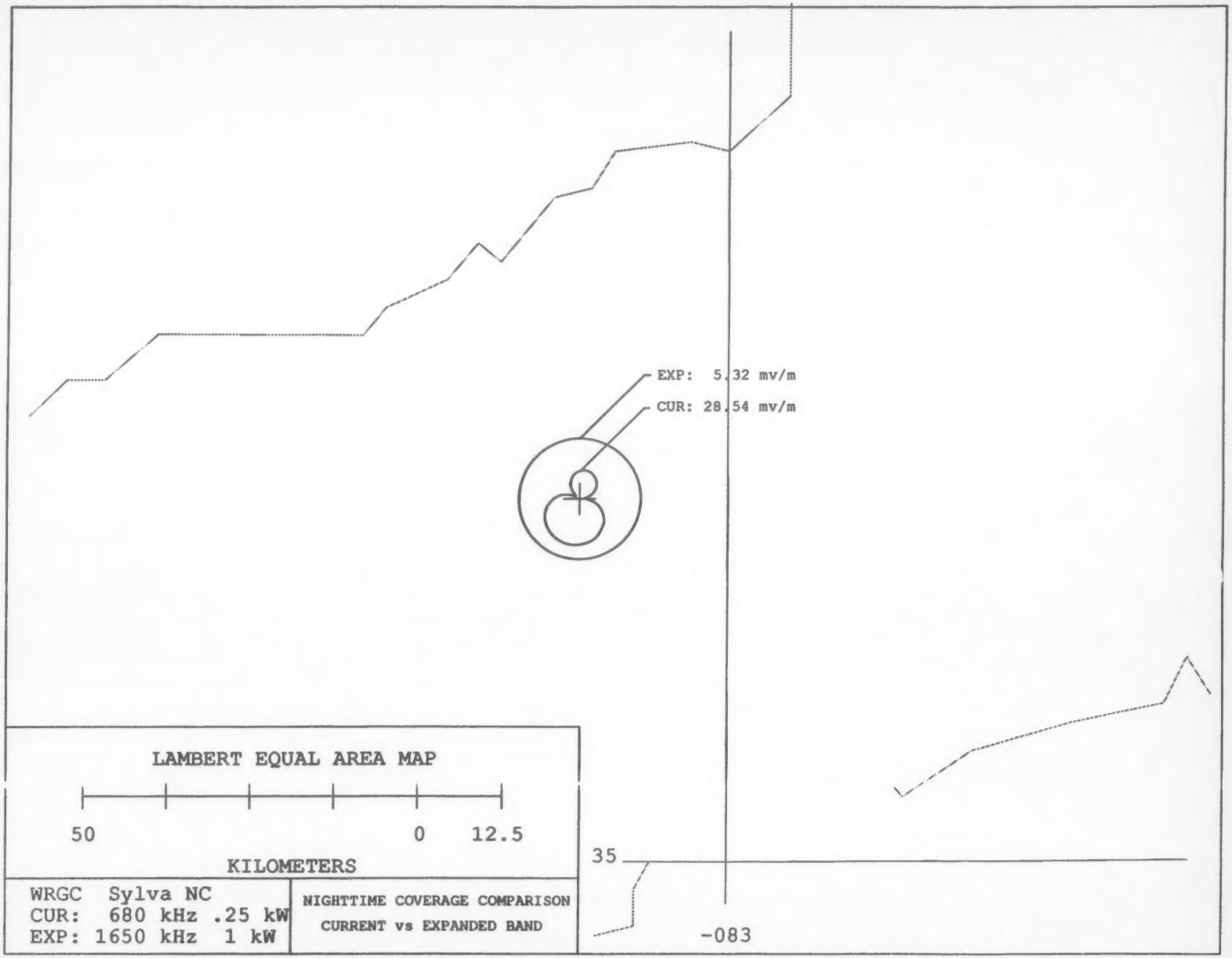
50 0 12.5

KILOMETERS

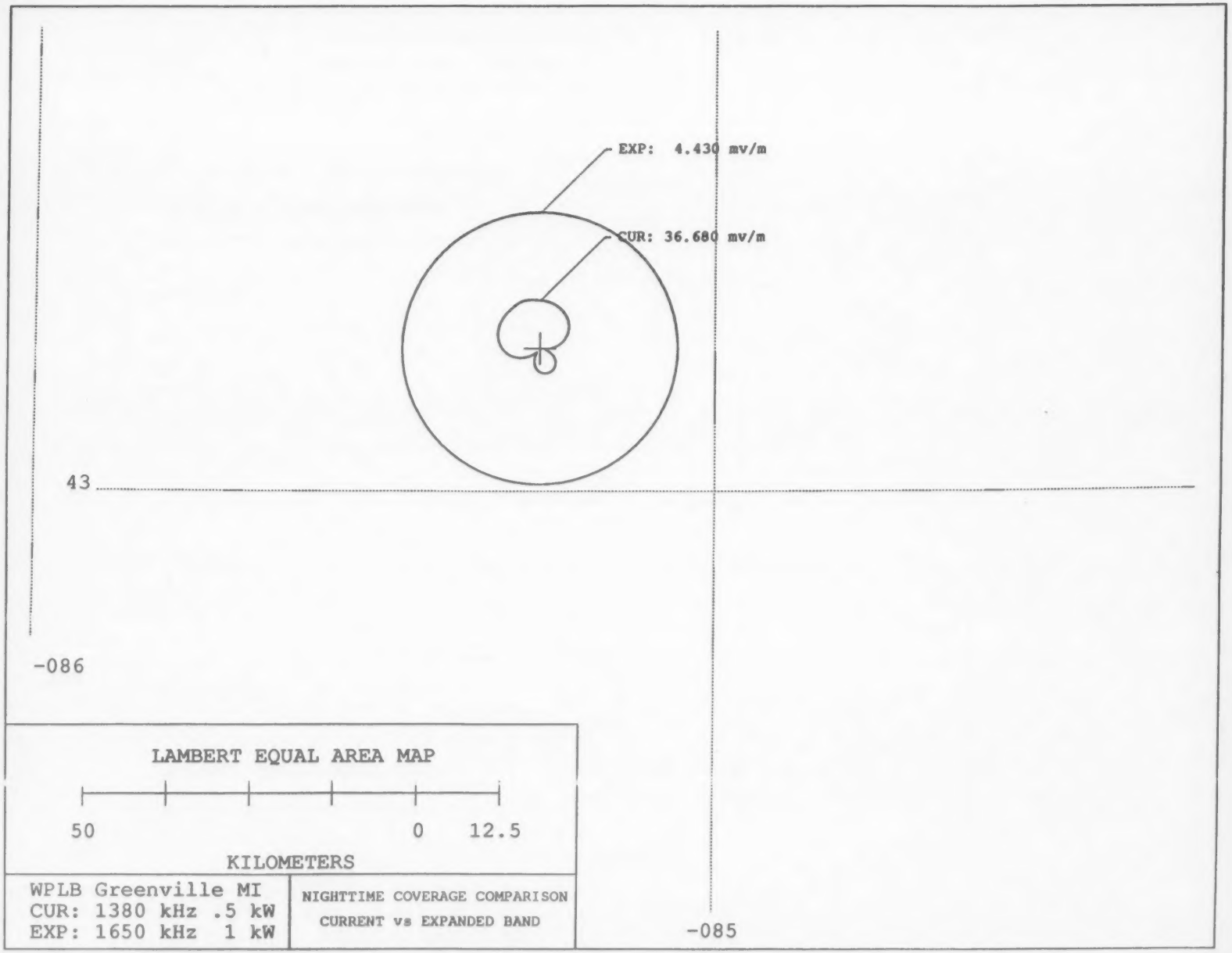
WMOX Meridian MS CUR: 1010 kHz 1 kW EXP: 1620 kHz 1 kW	NIGHTTIME COVERAGE COMPARISON CURRENT vs EXPANDED BAND


EXP: 1.634 mv/m
CUR: 31.380 mv/m
-123
47
-122
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
KRIZ Renton WA
CUR: 1420 kHz .5 kW
EXP: 1680 kHz 1 kW
NIGHTTIME COVERAGE COMPARISON
CURRENT vs EXPANDED BAND

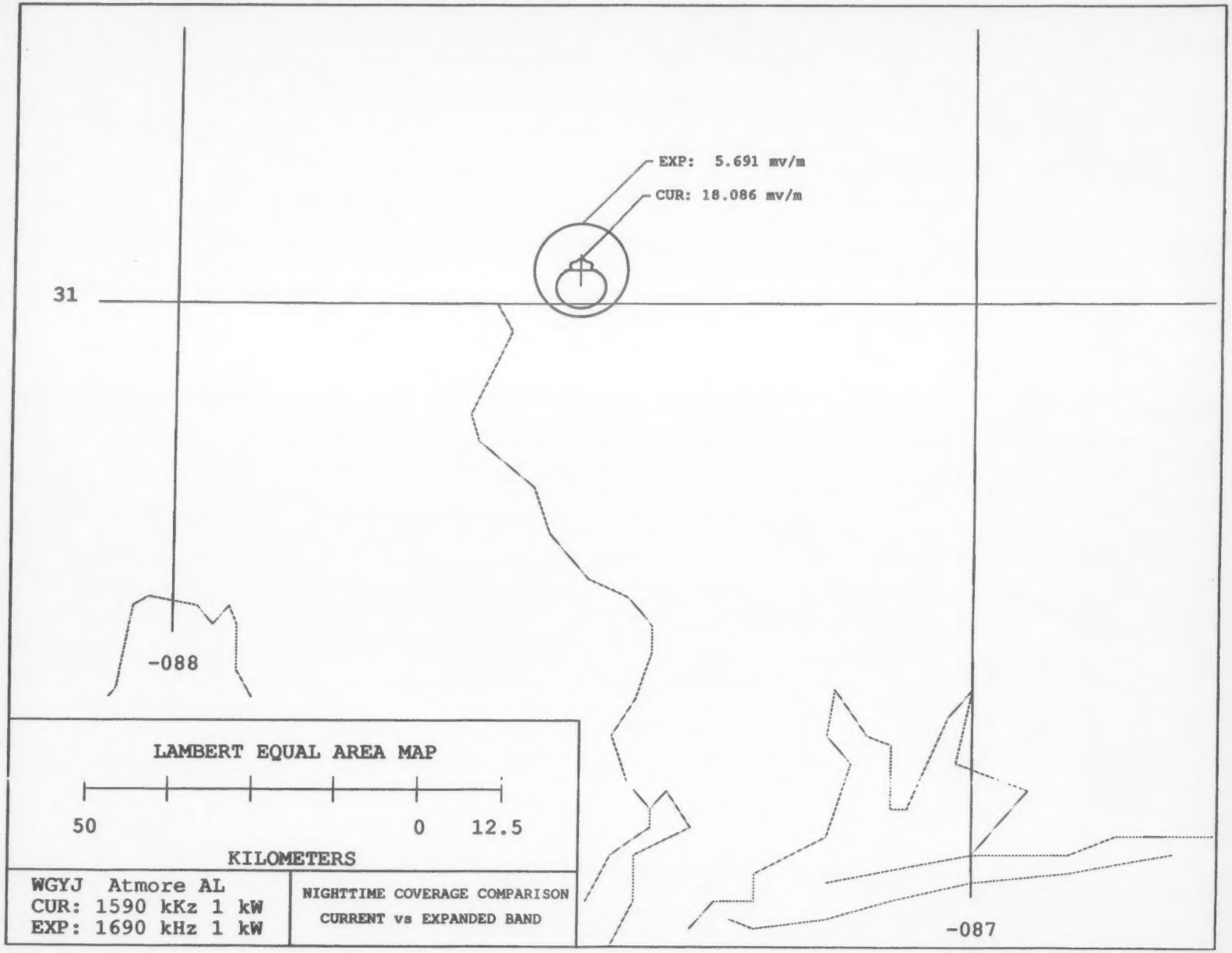
6386


EXP: 5.32 mv/m
CUR: 28.54 mv/m
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
WRGC Sylva NC
CUR: 680 kHz .25 kW
EXP: 1650 kHz 1 kW
NIGHTTIME COVERAGE COMPARISON
CURRENT vs EXPANDED BAND
35
-083

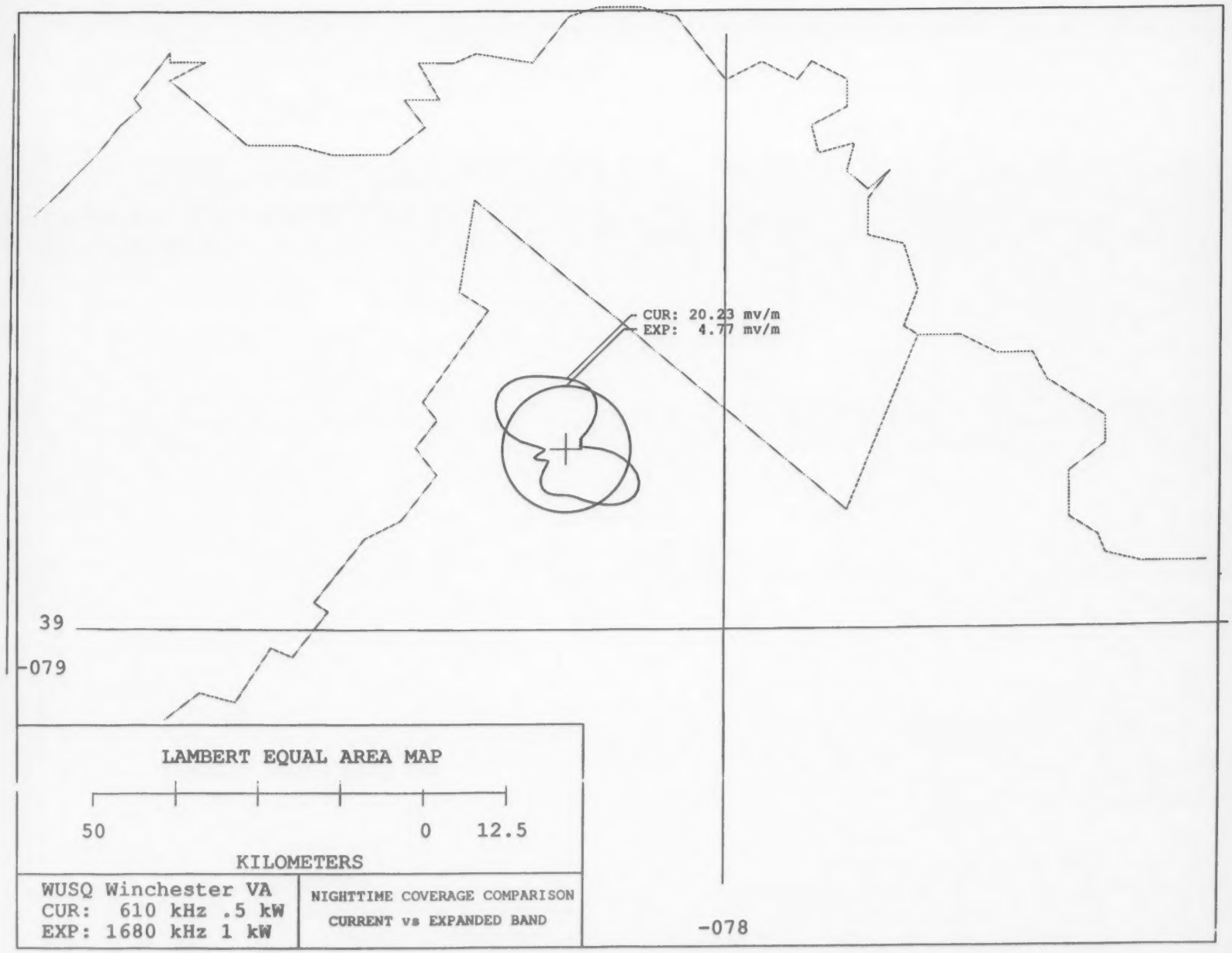
6387


EXP: 4.430 mv/m
CUR: 36.680 mv/m
43
-086
-085
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
WPLB Greenville MI
CUR: 1380 kHz .5 kW
EXP: 1650 kHz 1 kW
NIGHTTIME COVERAGE COMPARISON
CURRENT vs EXPANDED BAND

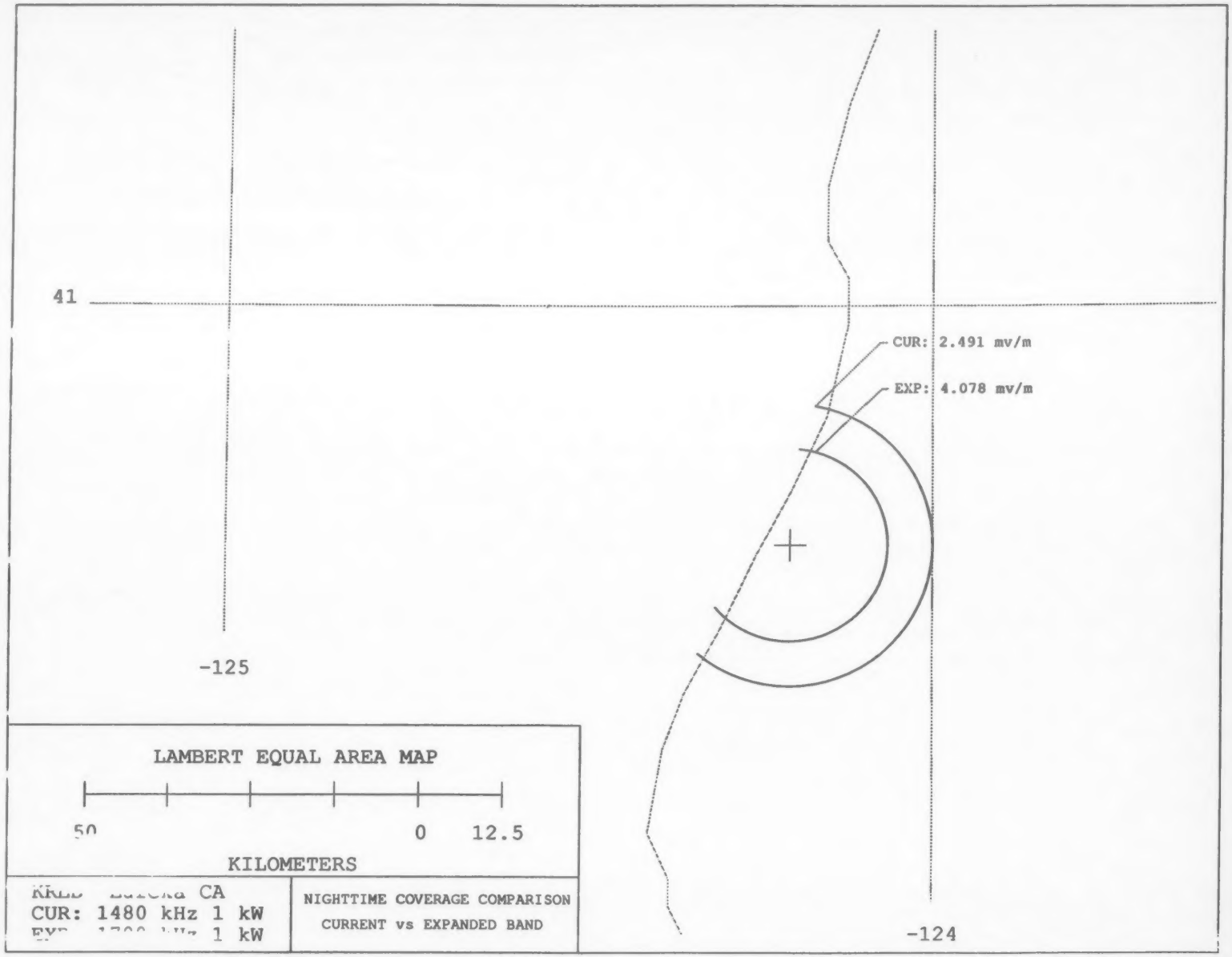
6388


EXP: 5.691 mv/m
CUR: 18.086 mv/m
31
-088
-087
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
WGYJ Atmore AL
CUR: 1590 kKz 1 kW
EXP: 1690 kHz 1 kW
NIGHTTIME COVERAGE COMPARISON
CURRENT vs EXPANDED BAND

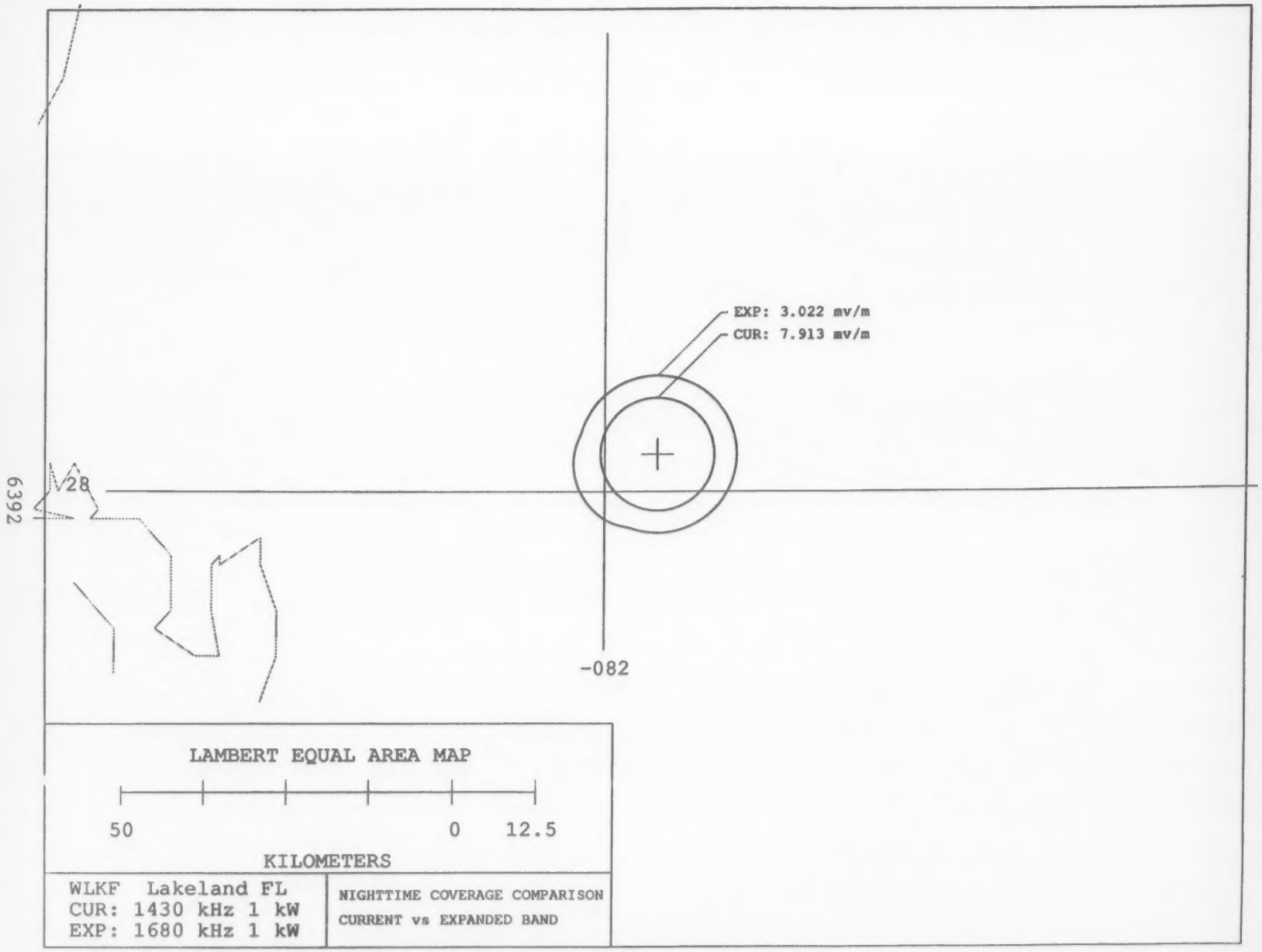
6389

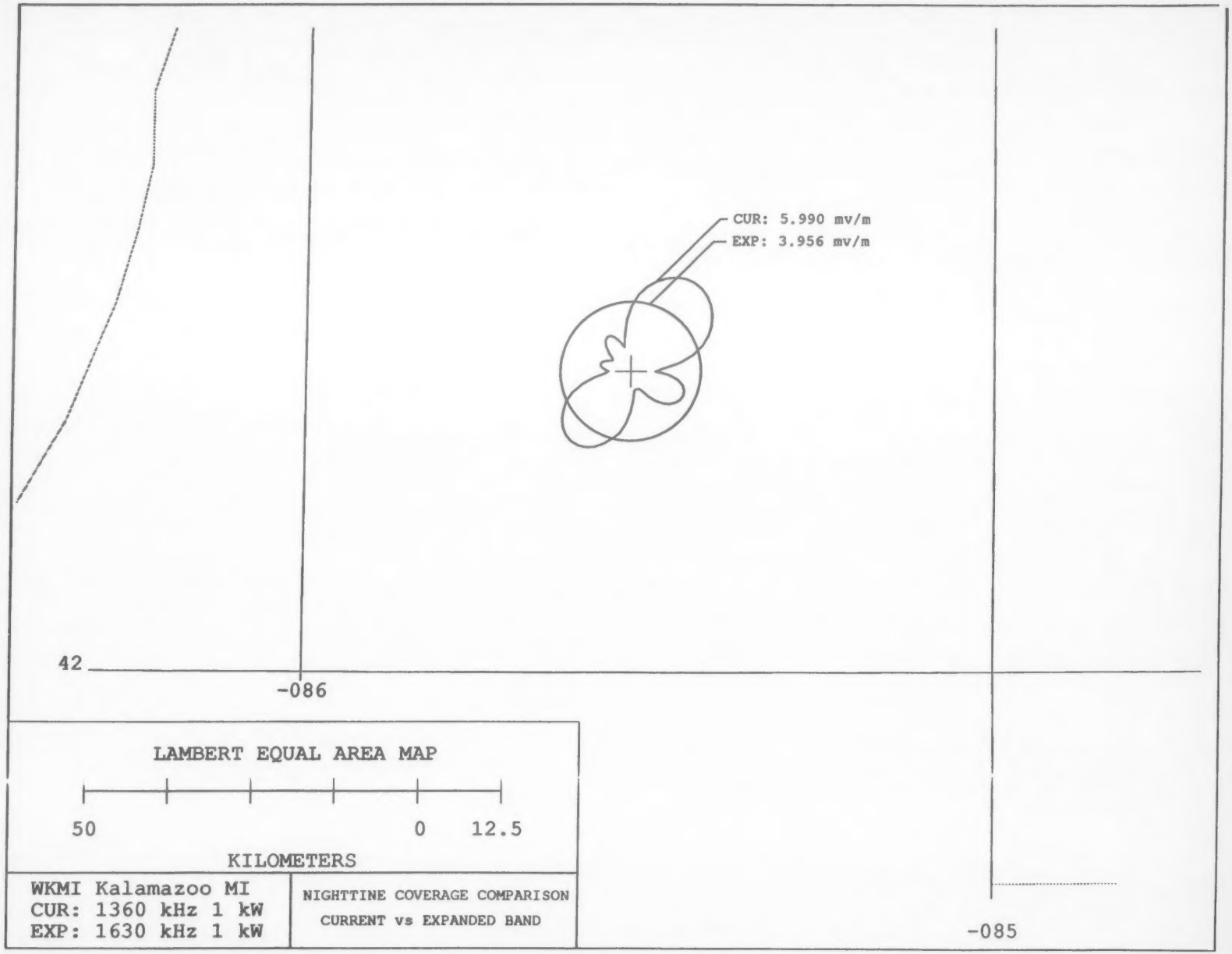

CUR: 20.23 mv/m
EXP: 4.77 mv/m
39
-079
-078
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
WUSQ Winchester VA
CUR: 610 kHz .5 kW
EXP: 1680 kHz 1 kW
NIGHTTIME COVERAGE COMPARISON
CURRENT vs EXPANDED BAND

630


41
-125
-124
CUR: 2.491 mv/m
EXP: 4.078 mv/m
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
KRLB Eureka CA
CUR: 1480 kHz 1 kW
EXP: 1700 kHz 1 kW
NIGHTTIME COVERAGE COMPARISON
CURRENT vs EXPANDED BAND

6391


EXP: 3.022 mv/m
CUR: 7.913 mv/m
V28
6392
-082
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
WLKF Lakeland FL
CUR: 1430 kHz 1 kW
EXP: 1680 kHz 1 kW
NIGHTTIME COVERAGE COMPARISON
CURRENT vs EXPANDED BAND


CUR: 5.990 mv/m
EXP: 3.956 mv/m
42
-086
-085
LAMBERT EQUAL AREA MAP
50
0
12.5
KILOMETERS
WKMI Kalamazoo MI
CUR: 1360 kHz 1 kW
EXP: 1630 kHz 1 kW
NIGHTTINE COVERAGE COMPARISON
CURRENT vs EXPANDED BAND

6393

Appendix E

Part 2 of Title 47 of the CFR is amended as follows:

1. The authority citation for Part 2 continues to read as follows:

Authority: 47 U.S.C. 154 and 303

2. Section §2.106 is amended by revising the 535-1705 kHz band, by adding US321, by revising footnotes US221, US238, US299, NG128 and 480 and by removing footnote US237 as follows:

§2.106 Table of Frequency Allocations

* * *

United States Table		FCC Use Designators	
Government	Non-government		
Allocation kHz	Allocation kHz	Rule Part(s)	Special-use Frequencies
(4)	(5)	(6)	(7)
* * *	* * *	* * *	* * *
535-1705 480 US238 US299 US321	535-1705 BROADCASTING. 480 US238 US299 US321 NG128	RADIO BROADCASTING (AM) (73). Alaska Fixed (80). Auxiliary Broadcasting (74). Private Land Mobile (90).	535-1705 kHz: Travelers Information.

* * * * *

UNITED STATES (US) FOOTNOTES

* * *

US221 In the 525-535 kHz band, the mobile service is limited to distribution of public service information from Travelers Information Stations operating on 530 kHz.

* * *

US238 The 1605-1705 kHz band is allocated to the radiolocation service on a secondary basis.

* * *

US299 The 1615-1705 kHz band in Alaska is also allocated to the maritime mobile services and the Alaska fixed service on a secondary basis to Region 2 broadcast operations.

* * *

US321 The 535-1705 kHz band is also allocated to the mobile service on a secondary basis for the distribution of public service information from Travelers Information Stations operating on 10 kHz spaced channels from 540 to 1700 kHz.

* * *

NON-GOVERNMENT (NG) FOOTNOTES

* * *

NG128 In the 535-1705 kHz band, AM broadcast licensees or permittees may use their AM carrier on a secondary basis to transmit signals intended for both broadcast and non-broadcast purposes. In the 88-108 MHz band, FM broadcast licensees or permittees are permitted to use subcarriers on a secondary basis to transmit signals intended for both broadcast and non-broadcast purposes. In the 54-72, 76-88, 174-216 and 740-890 MHz bands, TV broadcast licensees or permittees are permitted to use subcarriers on a secondary basis for both broadcast and non-broadcast purposes.

* * * * *

INTERNATIONAL FOOTNOTES

* * *

480 In Region 2, the use of the 1605-1705 kHz band by stations of the broadcasting service is subject to the Plan established by the Regional Administrative Radio Conference (Rio de Janeiro, 1988).

In Region 2, in the 1625-1705 kHz band, the relationship between the broadcasting, fixed and mobile services is shown in No. 419. However, the examination of frequency assignments to stations of the fixed and mobile services in the 1625-1705 kHz band under No. 1241 shall take account of the allotments appearing in the plan established by the Regional Administrative Radio Conference (Rio de Janeiro, 1988).

* * * * *

Part 73 of Title 47 of the CFR is amended as follows:

3. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

4. Section 73.14 is amended by removing the Note following the definition of AM broadcast channel, by removing the last sentence of the definition of AM broadcast station, by removing the definitions of Dominant station and Secondary AM station, by revising the definitions of AM broadcast band, AM broadcast channel, AM broadcast station, Main channel, Maximum percentage of modulation and Stereophonic channel, and by adding definitions of Model I and Model II facilities, to read as follows:

§73.14 AM broadcast definitions.

AM broadcast band. The band of frequencies extending from 535 to 1705 kHz.

AM broadcast channel. The band of frequencies occupied by the carrier and the upper and lower sidebands of an AM broadcast signal with the carrier frequency at the center. Channels are designated by their assigned carrier frequencies. The 117 carrier frequencies assigned to AM broadcast stations begin at 540 kHz and progress in 10 kHz steps to 1700 kHz. (See §73.21 for the classification of AM broadcast channels).

AM broadcast station. A broadcast station licensed for the dissemination of radio communications intended to be received by the public and operated on a channel in the AM broadcast band.

* * * * *

Main channel. The band of audio frequencies from 50 to 10,000 Hz which amplitude modulates the carrier.

Maximum percentage of modulation. The greatest percentage of modulation that may be obtained by a transmitter without producing in its output, harmonics of the modulating frequency in excess of those permitted by these regulations. (See §73.1570)

* * * * *

Model I facility. A station operating in the 1605-1705 kHz band featuring fulltime operation with stereo, competitive technical quality, 10 kW daytime power, 1 kW nighttime power, non-directional antenna (or a simple directional antenna system), and separated by 400-800 km from other co-channel stations.

Model II facility. A station operating in the 535-1605 kHz band featuring fulltime operation, competitive technical quality, wide area daytime coverage with nighttime coverage at least 15% of the daytime coverage.

* * * * *

Stereophonic channel. The band of audio frequencies from 50 to 10,000 Hz containing the stereophonic information which modulates the radio frequency carrier.

* * * * *

5. Section 73.21 is revised to read as follows:

§73.21 Classes of AM broadcast channels and stations.

(a) Clear channel. A clear channel is one on which stations are assigned to serve wide areas. These stations are protected from objectionable interference within their primary service areas and, depending on the class of station, their secondary service areas. Stations operating on these channels are classified as follows:

(1) Class A station. A Class A station is an unlimited time station that operates on a clear channel and is designed to render primary and secondary service over an extended area and at relatively long distances from its transmitter. Its primary service area is protected from objectionable interference from other stations on the same and adjacent channels, and its secondary service area is protected from interference from other stations on the same channel. (See §73.182). The operating power shall not be less than 10 kW nor more than 50 kW. (Also see §73.25(a)).

(2) Class B station. A Class B station is an unlimited time station which is designed to render service only over a primary service area. Class B stations are authorized to operate with a minimum power of 0.25 kW (or, if less than 0.25 kW, an equivalent RMS antenna field of at least 141 mV/m at 1 km) and a maximum power of 50 kW, or 10 kW for stations that are authorized to operate in the 1605-1705 kHz band.

(3) Class D station. A Class D station operates either daytime, limited time or unlimited time with nighttime power less than 0.25 kW and an equivalent RMS antenna field of less than 141 mV/m at one km. Class D stations shall operate with daytime powers not less than 0.25 kW nor more than 50 kW. Nighttime operations of Class D stations are not afforded protection and must protect all Class A and Class B operations during nighttime hours. New Class D stations that had not been previously licensed as Class B will not be authorized.

(b) Regional Channel. A regional channel is one on which Class B and Class D stations may operate and serve primarily a principal center of population and the rural area contiguous thereto.

Note: Until the North American Regional Broadcasting Agreement (NARBA) is terminated with

respect to the Bahama Islands and the Dominican Republic, radiation toward those countries from a Class B station may not exceed the level that would be produced by an omnidirectional antenna with a transmitted power of 5 kW, or such lower level as will comply with NARBA requirements for protection of stations in the Bahama Islands and the Dominican Republic against objectionable interference.

(c) Local channel. A local channel is one on which stations operate unlimited time and serve primarily a community and the suburban and rural areas immediately contiguous thereto.

(1) Class C station. A Class C station is a station operating on a local channel and is designed to render service only over a primary service area that may be reduced as a consequence of interference in accordance with §73.182. The power shall not be less than 0.25 kW, nor more than 1 kW. Class C stations that are licensed to operate with 0.1 kW may continue to do so.

6. Section 73.22 is removed.

7. Section 73.3570 is redesignated as Section 73.23 and revised to read as follows:

§73.23 AM broadcast station applications affected by international agreements.

(a) Except as provided in paragraph (b) of this section, no application for an AM station will be accepted for filing if authorization of the facilities requested would be inconsistent with international commitments of the United States under treaties and other international agreements, arrangements and understandings. (See list of such international instruments in §73.1650(b)). Any such application that is inadvertently accepted for filing will be dismissed.

(b) AM applications that involve conflicts only with the North American Regional Broadcasting Agreement (NARBA), but that are in conformity with the remaining treaties and other international agreements listed in §73.1650(b) and with the other requirements of Part 73, will be granted subject to such modifications as the FCC may subsequently find appropriate, taking international considerations into account.

(c) In the case of any application designated for hearing on issues other than those related to consistency with international relationships and as to which no final decision has been rendered, whenever action under this section becomes appropriate because of inconsistency with international relationships, the applicant involved shall, notwithstanding the provisions §§73.3522 and 73.3571, be permitted to amend its application to achieve consistency with such relationships. In such cases the provisions of §73.3605(c) will apply.

(d) In some circumstances, special international considerations may require that the FCC, in acting on applications, follow procedures different from those established for general use. In such cases, affected applicants will be informed of the procedures to be followed.

8. In Section 73.24, the Note following paragraph (b) is removed, the last sentence of

paragraph (e) is removed, paragraph (h) is revised, paragraph (i) is removed, and paragraph (j) is redesignated as (i) and is revised to read as follows:

§73.24 Broadcast facilities; showing required.

* * * * *

(e) That the technical equipment proposed, the location of the transmitter, and other technical phases of operation comply with the regulations governing the same, and the requirements of good engineering practice.

* * * * *

(h) That, in the case of an application for a Class B or Class D station on a clear channel, the proposed station would radiate, during two hours following local sunrise and two hours preceding local sunset, in any direction toward the 0.1 mV/m groundwave contour of a co-channel United States Class A station, no more than the maximum value permitted under the provisions of §73.187.

(i) That, for all stations, the daytime 5 mV/m contour encompasses the entire principal community to be served. That, for stations in the 535-1605 kHz band, 80% of the principal community is encompassed by the nighttime 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That, for stations in the 1605-1705 kHz band, 50% of the principal community is encompassed by the 5 mV/m contour or the nighttime interference-free contour, whichever value is higher. That, Class D stations with nighttime authorizations need not demonstrate such coverage during nighttime operation.

* * * * *

9. In Section 73.25, paragraphs (a)(1), (a)(2), (a)(2)(i), (a)(2)(ii) and (a)(2)(iii) are removed, and the heading, paragraphs (a), (b), and (c) and the Note following paragraph (b) are revised to read as follows:

§73.25 Clear channels; Class A, Class B and Class D stations.

* * * * *

(a) On each of the following channels, one Class A station may be assigned, operating with power of 50 kW: 640, 650, 660, 670, 700, 720, 750, 760, 770, 780, 820, 830, 840, 870, 880, 890, 1020, 1030, 1040, 1100, 1120, 1160, 1180, 1200, and 1210 kHz. In Alaska, these frequencies can be used by Class A stations subject to the conditions set forth in §73.182(a)(1)(ii). On the channels listed in this paragraph, Class B and Class D stations may be assigned.

(b) To each of the following channels there may be assigned Class A, Class B and Class D

stations: 680, 710, 810, 850, 940, 1000, 1060, 1070, 1080, 1090, 1110, 1130, 1140, 1170, 1190, 1500, 1510, 1520, 1530, 1540, 1550, and 1560 kHz.

Note: Until superseded by a new agreement, protection of the Bahama Islands shall be in accordance with NARBA. Accordingly, a Class A, Class B or Class D station on 1540 kHz shall restrict its signal to a value no greater than 4 μV/m groundwave or 25 μV/m-10% skywave at any point of land in the Bahama Islands, and such stations operating nighttime (i.e., sunset to sunrise at the location of the U.S. station) shall be located not less than 650 miles from the nearest point of land in the Bahama Islands.

(c) Class A, Class B and Class D stations may be assigned on 540, 690, 730, 740, 800, 860, 900, 990, 1010, 1050, 1220, 1540, 1570, and 1580 kHz.

10. Section 73.26 is revised to read as follows:

§73.26 Regional channels; Class B and Class D stations.

(a) The following frequencies are designated as regional channels and are assigned for use by Class B and Class D stations: 550, 560, 570, 580, 590, 600, 610, 620, 630, 790, 910, 920, 930, 950, 960, 970, 980, 1150, 1250, 1260, 1270, 1280, 1290, 1300, 1310, 1320, 1330, 1350, 1360, 1370, 1380, 1390, 1410, 1420, 1430, 1440, 1460, 1470, 1480, 1590, 1600, 1610 1620, 1630, 1640, 1650, 1660, 1670, 1680, 1690, and 1700 kHz.

(b) Additionally, in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands the frequencies 1230, 1240, 1340, 1400, 1450, and 1490 kHz are designated as Regional channels, and are assigned for use by Class B stations. Stations formerly licensed to these channels in those locations as Class C stations are redesignated as Class B stations.

11. Section 73.27 is revised to read as follows:

§73.27 Local channels; Class C stations.

Within the conterminous 48 states, the following frequencies are designated as local channels, and are assigned for use by Class C stations: 1230, 1240, 1340, 1400, 1450, and 1490 kHz.

12. In Section 73.28, paragraph (a) is removed, paragraph (b) is redesignated as paragraph (a) and revised to read as follows:

§73.28 Assignment of stations to channels.

(a) The Commission will not make an AM station assignment that does not conform with international requirements and restrictions on spectrum use that the United States has accepted as a signatory to treaties, conventions, and other international agreements. See §73.1650 for a list of pertinent treaties, conventions and agreements, and §73.23 for procedural provisions

relating to compliance with them.

* * * * *

13. Section 73.29 is revised to read as follows:

§73.29 Class C stations on regional channels.

No license will be granted for the operation of a Class C station on a regional channel.

14. A new Section 73.30 is added to read as follows:

§73.30 Petition for authorization of an allotment in the 1605-1705 kHz band.

(a) Any party interested in operating an AM broadcast station on one of the ten channels in the 1605-1705 kHz band must file a petition for the establishment of an allotment to its community of license. Each petition must include the following information:

(1) name of community for which allotment is sought; (2) frequency and call letters of the petitioner's existing AM operation; and (3) statement as to whether or not AM stereo operation is proposed for the operation in the 1605-1705 kHz band.

(b) Petitions are to be filed during a filing period to be determined by the Commission. For each filing period, eligible stations will be allotted channels based on the following steps:

(1) Stations are ranked in descending order according to the calculated improvement factor.

(2) The station with the higest improvement factor is initially allotted the lowest available channel.

(3) Successively, each station with the next lowest improvement factor, is allotted an available channel taking into account the possible frequency and location combinations and relationship to previously selected allotments. If a channel is not available for the subject station, previous allotments are examined with respect to an alternate channel, the use of which would make a channel available for the subject station.

(4) When it has been determined that, in accordance with the above steps, no channel is available for the subject station, that station is no longer considered and the process continues to the station with the next lowest improvement factor.

(c) If awarded an allotment, a petitioner will have sixty (60) days from the date of public notice of selection to file an application for construction permit on FCC Form 301. (See §§73.24 and 73.37(e) for filing requirements). Unless instructed by the Commission to do otherwise, the application shall specify Model I facilities. (See Section 73.14). Upon grant of the application

and subsequent construction of the authorized facility, the applicant must file a license application on FCC Form 302.

Note 1: Until further notice by the Commission, the filing of these petitions is limited to licensees of existing AM stations (excluding Class C stations) operating in the 535-1605 kHz band. Selection among competing petitions will be based on interference reduction. Notwithstanding the exception in Note 4, within each operational category, the station demonstrating the highest value of improvement factor will be afforded the highest priority for an allotment, with the next priority assigned to the station with next lowest value, and so on, until available allotments are filled.

Note 2: The Commission will periodically evaluate the progress of the movement of stations from the 535-1605 kHz band to the 1605-1705 kHz band to determine whether the 1605-1705 kHz band should continue to be administered on an allotment basis or modified to an assignment method. If appropriate, the Commission will later develop further procedures for use of the 1605-1705 kHz band by existing station licensees and others.

Note 3: Existing fulltime stations are considered first for selection as described in Note 1. In the event that an allotment availability exists for which no fulltime station has filed a relevant petition, such allotment may be awarded to a licensed Class D station. If more than one Class D station applies for this migration opportunity, the following priorities will be used in the selection process: First priority - A Class D station located within the 0.5 mV/m-50% contour of a U.S. Class A station and licensed to serve a community of 100,000 or more, for which there exists no local fulltime aural service; Second priority - Class D stations ranked in order of improvement factor, from highest to lowest, considering only those stations with improvement factors greater than zero.

Note 4: The preference for AM stereo in the expanded band will be administered as follows: when an allotment under consideration (candidate allotment) conflicts with one or more previously selected allotments (established allotments) and cannot be accommodated in the expanded band, the candidate allotment will be substituted for the previously established allotment provided that: the petitioner for the candidate allotment has made a written commitment to the use of AM stereo and the petitioner for the established allotment has not; the difference between the ranking factors associated with the candidate and established allotments does not exceed 10% of the ranking factor of the candidate allotment; the substitution will not require the displacement of more than one established allotment; and both the candidate allotment and the established allotment are within the same priority group.

15. Section 73.35 is added to read as follows:

§73.35 Calculation of improvement factors.

(a) A petition for an allotment (See §73.30) in the 1605-1705 kHz band filed by an existing fulltime AM station licensed in the 535-1605 kHz band will be ranked according to the station's

calculated improvement factor. (See §73.30) Improvement factors relate to both nighttime and daytime interference conditions and are based on two distinct considerations: (1) service area lost by other stations due to interference caused by the subject station, and (2) service area of the subject station. These considerations are represented by a ratio. The ratio consists, where applicable, of two separate additive components, one for nighttime and one for daytime. For the nighttime component, to determine the numerator of the ratio (first consideration), calculate the RSS and associated service area of the stations (co- and adjacent channel) to which the subject station causes nighttime interference. Next, repeat the RSS and service area calculations excluding the subject station. The cumulative gain in the above service areas is the numerator of the ratio. The denominator (second consideration) is the subject station's interference-free service area. For the daytime component, the composite amount of service lost by co-channel and adjacent channel stations, each taken individually, that are affected by the subject station, excluding the effects of other assignments during each study, will be used as the numerator of the daytime improvement factor. The denominator will consist of the actual daytime service area (0.5 mV/m contour) less any area lost to interference from other assignments. The value of this combined ratio will constitute the petitioner's improvement factor. Notwithstanding the requirements of §73.153, for uniform comparisons and simplicity, measurement data will not be used for determining improvement factors and FCC figure M-3 ground conductivity values are to be used exclusively in accordance with the pertinent provisions of §73.183(c)(1).

16. Section 73.37 is revised to read as follows:

§73.37 Applications for broadcast facilities, showing required.

(a) No application will be accepted for a new station if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph; and no application will be accepted for a change of the facilities of an existing station if the proposed change would involve such overlap where there is not already such overlap between the stations involved:

Frequency Separation (kHz)	Contour of Proposed Station (Classes B, C and D) (mV/m)	Contour of Any Other Station (mV/m)
0	0.005 0.025 0.500	0.100 (Class A) 0.500 (Other Classes) 0.025 (All classes)
10	0.250 0.500	0.500 (All classes) 0.250 (All classes)
20	5 5	5 (All classes) 5 (All classes)
30	25	25 (All classes)

(b) In determining overlap received, an application for a new Class C station with daytime power of 250 watts, or greater, shall be considered on the assumption that both the proposed operation and all existing Class C stations operate with 250 watts and utilize non-directional antennas.

(c) If otherwise consistent with the public interest, an application requesting an increase in the daytime power of an existing Class C station on a local channel from 250 watts to a maximum of 1 kW, or from 100 watts to a maximum of 500 watts, may be granted notwithstanding overlap prohibited by paragraph (a) of this section. In the case of a 100 watt Class C station increasing daytime power, the provisions of this paragraph shall not be construed to permit an increase in power to more than 500 watts, if prohibited overlap would be involved, even if successive applications should be tendered.

(d) In addition to demonstrating compliance with paragraphs (a), and, as appropriate, (b), and (c) of this section, an application for a new AM broadcast station, or for a major change (see §73.3571(a)(1) of this chapter) in an authorized AM broadcast station, as a condition for its acceptance, shall make a satisfactory showing, if new or modified nighttime operation by a Class B station is proposed, that objectionable interference will not result to an authorized station, as determined pursuant to §73.182(1) of this chapter.

(e) An application for an authorization in the 1605-1705 kHz band which has been selected through the petition process (See §73.30) is not required to demonstrate compliance with (a), (b), (c), or (d) of this section. Instead, the applicant need only comply with the terms of the allotment authorization issued by the Commission in response to the earlier petition for establishment of a station in the 1605-1705 kHz band. Within the allotment authorization, the Commission will specify the assigned frequency and the applicable technical requirements.

(f) Stations on 1580, 1590 and 1600 kHz. In addition to the rules governing the authorization

of facilities in the 535-1605 kHz band, stations on these frequencies seeking facilities modifications must protect assignments in the 1610-1700 kHz band. Such protection shall be afforded in a manner which considers the spacings that occur or exist between the subject station and a station within the range 1605-1700 kHz. The spacings are the same as those specified for stations in the frequency band 1610-1700 kHz or the current separation distance, whichever is greater. Modifications that would result in a spacing or spacings that fails to meet any of the separations must include a showing that appropriate adjustment has been made to the radiated signal which effectively results in a site-to-site radiation that is equivalent to the radiation of a station with standard Model I facilities (10 kW-D, 1 kW-N, non-DA, 90 degree antenna ht. & ground system) operating in compliance with all of the above separation distances. In those cases where that radiation equivalence value is already exceeded, a station may continue to maintain, but not increase beyond that level.

Note 1: In the case of applications for changes in the facilities of AM broadcast stations covered by this section, an application will be accepted even though overlap of field strength contours as mentioned in this section would occur with another station in an area where such overlap does not already exist, if: (1) The total area of overlap with that station would not be increased; (2) there would be no net increase in the area of overlap with any other station; and (3) there would be created no area of overlap with any station with which overlap does not now exist.

Note 2: The provisions of this section concerning prohibited overlap of field strength contours will not apply where: (1) the area of overlap lies entirely over sea water: or (2) the only overlap involved would be that caused to a foreign station, in which case the provisions of the applicable international agreement, as identified in §73.1650, will apply. When overlap would be received from a foreign station, the provisions of this section will apply, except where there would be overlap with a foreign station with a frequency separation of 20 kHz, in which case the provisions of the international agreement will apply in lieu of this section.

Note 3: In determining the number of "authorized" aural transmission facilities in a given community, applications for that community in hearing or otherwise having protected status under specified "cut-off" procedures shall be considered as existing stations. In the event that there are two or more mutually exclusive protected applications seeking authorization for the proposed community it will be assumed that only one is "authorized."

Note 4: A "transmission facility" for a community is a station licensed to the community. Such a station provides a "transmission service" for that community.

17. In Section 73.53, paragraph (b)(1) is revised and a new Note is added after paragraph (c) to read as follows:

§73.53 Requirements for authorization of antenna monitors.

* * * * *

(b) * * *

(1) The monitor shall be designed to operate in the 535-1705 kHz band.

* * * * *

Note: In (b)(1) above, the requirement that monitors be capable of operation in the 535-1705 kHz band shall apply only to equipment manufactured after July 1, 1992. Use of a monitor in the 1605-1705 kHz band which is not approved for such operation will be permitted pending the general availability of 535-1705 kHz band monitors if a manufacturer can demonstrate, in the interim, that its monitor performs in accordance with the standards in this section on these 10 channels.

18. In Section 73.68, paragraph (d)(3) is revised to read as follows:

§73.68 Sampling systems for antenna monitors.

* * * * *

(d) * * *

(3) If that portion of the sampling system above the base of the towers is modified or components replaced, a partial proof of performance shall be executed in accordance with §73.154 subsequent to these changes. The partial proof of performance shall be accompanied by common point impedance measurements made in accordance with §73.54.

* * * * *

19. In Section 73.69, paragraph (d)(4) is revised to read as follows:

§73.69 Antenna monitors.

* * * * *

(4) If it cannot be established by the observations required in paragraph (d)(2) of this section that base current ratios and monitoring point values are within the tolerances or limits prescribed by the rules and the instrument of authorization, or if the substitution of the new antenna monitor for the old results in changes in these parameters, a partial proof of performance shall be executed and analyzed in accordance with §73.154.

* * * * *

20. In Section 73.72, paragraph (a) is revised to read as follows:

§73.72 Operating during the experimental period.

(a) An AM station may operate during the experimental period (the time between midnight and sunrise, local time) on its assigned frequency and with its authorized power for the routine testing and maintenance of its transmitting system, and for conducting experimentation under an experimental authorization, provided no interference is caused to other stations maintaining a regular operating schedule within such period.

* * * * *

21. In Section 73.88, a new Note is added after the introductory language to read as follows:

§73.88 Blanketing interference.

* * * * *

Note: For more detailed instructions concerning operational responsibilities of licensees and permitees under this section, see §73.318 (b), (c) and (d).

22. Section 73.99 is revised to read as follows:

§73.99 Presunrise service authorization (PSRA) and Postsunset service authorization (PSSA).

(a) To provide maximum uniformity in early morning operation compatible with interference considerations, and to provide for additional service during early evening hours for Class D stations, provisions are made for presunrise service and postsunset service. The permissible power for presunrise or postsunset service authorizations shall not exceed 500 watts, or the authorized daytime or critical hours power (whichever is less). Calculation of the permissible power shall consider only co-channel stations for interference protection purposes.

(b) Presunrise service authorizations (PSRA) permit:

(1) Class D stations operating on Mexican, Bahamian, and Canadian priority Class A clear channels to commence PSRA operation at 6:00 a.m. local time and to continue such operation until the sunrise times specified in their basic instruments of authorization.

(2) Class D stations situated outside 0.5 mV/m-50% skywave contours of co-channel U.S. Class A stations to commence PSRA operation at 6:00 a.m. local time and to continue such operation until sunrise times specified in their basic instruments of authorization.

(3) Class D stations located within co-channel 0.5 mV/m-50% skywave contours of U.S. Class A stations, to commence PSRA operation either at 6:00 a.m. local time, or at sunrise at the nearest Class A station located east of the Class D station (whichever is later), and to continue

such operation until the sunrise times specified in their basic instruments of authorization.

(4) Class B and Class D stations on regional channels to commence PSRA operation at 6.00 a.m. local time and to continue such operation until local sunrise times specified in their basic instruments of authorization.

(c) Extended Daylight Saving Time Pre-Sunrise Authorizations:

(1) Between the first Sunday in April and the end of the month of April, Class D stations will be permitted to conduct pre-sunrise operation beginning at 6:00 a.m. local time with a maximum power of 500 watts (not to exceed the station's regular daytime or critical hours power), reduced as necessary to comply with the following requirements:

(i) Full protection is to be provided as specified in applicable international agreements.

(ii) Protection is to be provided to the 0.5 mV/m groundwave signals of co-channel U.S. Class A stations; protection to the 0.5 mV/m-50% skywave contours of these stations is not required.

(iii) In determining the protection to be provided, the effect of each interfering signal will be evaluated separately. The presence of interference from other stations will not reduce or eliminate the required protection.

(iv) Notwithstanding the requirements of paragraph (c)(1)(ii) and (iii) of this section, the stations will be permitted to operate with a minimum power of 10 watts unless a lower power is required by international agreement.

(2) The Commission will issue appropriate authorizations to Class D stations not previously eligible to operate during this period. Class D stations authorized to operate during this pre-sunrise period may continue to operate under their current authorization.

(d) Postsunset service authorizations (PSSA) permit:

(1) Class D stations located on Mexican, Bahamian, and Canadian priority Class A clear channels to commence PSSA operation at sunset times specified in their basic instruments of authorization and to continue for two hours after such specified times.

(2) Class D stations situated outside 0.5 mV/m-50% skywave contours of co-channel U.S. Class A stations to commence PSSA operations at sunset times specified in their basic instruments of authorization and to continue for two hours after such specified times.

(3) Class D stations located within co-channel 0.5 mV/m-50% skywave contours of U.S. Class A stations to commence PSSA operation at sunset times specified in their basic instruments of authorization and to continue such operation until two hours past such specified times, or until sunset at the nearest Class A station located west of the Class D station, whichever is earlier.

Class D stations located west of the Class A station do not qualify for PSSA operation.

(4) Class D stations on regional channels to commence PSSA operation at sunset times specified on their basic instruments of authorization and to continue such operation until two hours past such specified times.

(e) Procedural Matters. (1) Applications for PSRA and PSSA operation are not required. Instead, the FCC will calculate the periods of such operation and the power to be used pursuant to the provisions of this section and the protection requirements contained in applicable international agreements. Licensees will be notified of permissible power and times of operation. Presunrise and Postsunset service authority permits operation on a secondary basis and does not confer license rights. No request for such authority need be filed. However, stations intending to operate PSRA or PSSA shall submit by letter, signed as specified in §73.3513, the following information:

(i) Licensee name, station call letters and station location,

(ii) Indication as to whether PSRA operation, PSSA operation, or both, is intended by the station,

(iii) A description of the method whereby any necessary power reduction will be achieved.

(2) Upon submission of the required information, such operation may begin without further authority.

(f) Technical Criteria. Calculations to determine whether there is objectionable interference will be determined in accordance with the AM Broadcast Technical Standards, §§73.182 through 73.190, and applicable international agreements. Calculations will be performed using daytime antenna systems, or critical hours antenna systems when specified on the license. In performing calculations to determine assigned power and times for commencement of PSRA and PSSA operation, the following standards and criteria will be used:

(1) Class D stations operating in accordance with paragraphs (b)(1), (b)(2), (d)(1), and (d)(2) of this section are required to protect the nighttime 0.5 mV/m-50% skywave contours of co-channel Class A stations. Where a 0.5 mV/m-50% skywave signal from the Class A station is not produced, the 0.5 mV/m groundwave contour shall be protected.

(2) Class D stations are required to fully protect foreign Class B and Class C stations when operating PSRA and PSSA; Class D stations operating PSSA are required to fully protect U.S. Class B stations. For purposes of determining protection, the nighttime RSS limit will be used in the determination of maximum permissible power.

(3) Class D stations operating in accordance with paragraphs (d)(2) and (d)(3) of this section are required to restrict maximum 10% skywave radiation at any point on the daytime 0.1 mV/m

groundwave contour of a co-channel Class A station to 25 μV/m. The location of the 0.1 mV/m contour of the Class A station will be determined by use of Figure M3, *Estimated Ground Conductivity in the United States*. When the 0.1 mV/m contour extends beyond the national boundary, the international boundary shall be considered the 0.1 mV/m contour.

(4) Class B and Class D stations on regional channels operating PSRA and PSSA (Class D only) are required to provide full protection to co-channel foreign Class B and Class C stations.

(5) Class D stations on regional channels operating PSSA beyond 6:00 p.m. local time are required to fully protect U.S. Class B stations.

(6) The protection that Class D stations on regional channels are required to provide when operating PSSA until 6:00 p.m. local time is as follows:

(i) For the first half-hour of PSSA operation, protection will be calculated at sunset plus 30 minutes at the site of the Class D station;

(ii) For the second half-hour of PSSA operation, protection will be calculated at sunset plus one hour at the site of the Class D station;

(iii) For the second hour of PSSA operation, protection will be calculated at sunset plus two hours at the site of the Class D station;

(iv) Minimum powers during the period until 6:00 p.m. local time shall be permitted as follows:

Calculated Power	Adjusted Minimum Power
From 1 to 45 watts	50 watts
Above 45 to 70 watts	75 watts
Above 70 to 100 watts	100 watts

(7) For protection purposes, the nighttime RSS limit will be used in the determination of maximum permissible power.

(g) Calculations made under paragraph (d) of this section may not take outstanding PSRA or PSSA operations into account, nor will the grant of a PSRA or PSSA confer any degree of interference protection on the holder thereof.

(h) Operation under a PSRA or PSSA is not mandatory, and will not be included in determining compliance with the requirements of §73.1740. To the extent actually undertaken, however, presunrise operation will be considered by the FCC in determining overall compliance with past

programming representations and station policy concerning commercial matter.

(i) The PSRA or PSSA is secondary to the basic instrument of authorization with which it is to be associated. The PSRA or PSSA may be suspended, modified, or withdrawn by the FCC without prior notice or right to hearing, if necessary to resolve interference conflicts, to implement agreements with foreign governments, or in other circumstances warranting such action. Moreover, the PSRA or PSSA does not extend beyond the term of the basic authorization.

(j) The Commission will periodically recalculate maximum permissible power and times for commencing PSRA and PSSA for each Class D station operating in accordance with paragraph (c) of this section. The Commission will calculate the maximum power at which each individual station may conduct presunrise operations during extended daylight saving time and shall issue conforming authorizations. These original notifications and subsequent notifications should be associated with the station's authorization. Upon notification of new power and time of commencing operation, affected stations shall make necessary adjustments within 30 days.

(k) A PSRA and PSSA does not require compliance with §§73.45, 73.182 and 73.1560 where the operation might otherwise be considered as technically substandard. Further, the requirements of paragraphs (a)(5), (b)(2), (c)(2), and (d)(2) of §73.1215 concerning the scale ranges of transmission system indicating instruments are waived for PSRA and PSSA operation except for the radio frequency ammeters used in determining antenna input power.

(l) A station having an antenna monitor incapable of functioning at the authorized PSRA and PSSA power when using a directional antenna shall take the monitor reading using an unmodulated carrier at the authorized daytime power immediately prior to commencing PSRA or PSSA operations. Special conditions as the FCC may deem appropriate may be included for PSRA or PSSA to insure operation of the transmitter and associated equipment in accordance with all phases of good engineering practice.

23. Section 73.150 is amended by revising paragraphs (a), (b)(1), (b)(2), (b)(3), (b)(5)(iv), (b)(5)(v), and (b)(6)(vii), and equation 2, by changing all references to miles in paragraph (b)(1)(i) to kilometers, and by revising the formulas in paragraph (b)(1)(i) to read as follows:

§73.150 Directional antenna systems.

(a) For each station employing a directional antenna, all determinations of service provided and interference caused shall be based on the inverse distance fields of the standard radiation pattern for that station. (As applied to nighttime operation the term "standard radiation pattern" shall include the radiation pattern in the horizontal plane, and radiation patterns at angles above this plane.)

* * * * *

(b) * * *

(1) The standard radiation pattern for the proposed antenna in the horizontal plane, and where pertinent, tabulated values for the azimuthal radiation patterns for angles of elevation up to and including 60 degrees, with a separate section for each increment of 5 degrees.

(i) * * *

where:

$E(\phi,\theta)_{th}$ represents the theoretical inverse distance fields at one kilometer for the given azimuth and elevation.

* * *

The standard radiation pattern shall be constructed in accordance with the following mathematical expression:

$$E(\phi,\theta)_{std} = 1.05\sqrt{[E(\phi,\theta)_{th}]^2 + Q^2} \qquad \text{(Eq. 2)}$$

where:

$E(\phi,\theta)_{std}$ represents the inverse distance fields at one kilometer which are produced by the directional antenna in the horizontal and vertical planes. $E(\phi,\theta)_{th}$ represents the theoretical inverse distance fields at one kilometer as computed in accordance with Eq. 1, above.

Q is the greater of the following two quantities:

$$0.025g(\theta)E_{max} \quad or \quad 10.0g(\theta)\sqrt{P_{kW}}$$

* * * * *

(ii) * * *

(2) All patterns shall be computed for integral multiples of five degrees, beginning with zero degrees representing true north, and, shall be plotted to the largest scale possible on unglazed letter-size paper (main engraving approximately 7" x 10") using only scale divisions and subdivisions of 1, 2, 2.5, or 5 times 10^{nth}. The horizontal plane pattern shall be plotted on polar coordinate paper, with the zero degree point corresponding to true north. Patterns for elevation angles above the horizontal plane may be plotted in polar or rectangular coordinates, with the pattern for each angle of elevation on a separate page. Rectangular plots shall begin and end at true north, with all azimuths labelled in increments of not less than 20 degrees. If a rectangular plot is used, the ordinate showing the scale for radiation may be logarithmic. Such patterns for

elevation angles above the horizontal plane need be submitted only upon specific request by Commission staff. Minor lobe and null detail occurring between successive patterns for specific angles of elevation need not be submitted. Values of field strength on any pattern less than ten percent of the maximum field strength plotted on that pattern shall be shown on an enlarged scale. Rectangular plots with a logarithmic ordinate need not utilize an expanded scale unless necessary to show clearly the minor lobe and null detail.

(3) The effective (RMS) field strength in the horizontal plane of $E(\phi,\theta)_{std}$, $E(\phi,\theta)_{th}$ and the root-sum-square (RSS) value of the inverse distance fields of the array elements at 1 kilometer, derived from the equation for $E(\phi,\theta)_{th}$. These values shall be tabulated on the page on which the horizontal plane pattern is plotted, which shall be specifically labelled as the Standard Horizontal Plane Pattern.

(4) * * *

(5) * * *

(iv) Where waiver of the content of this section is requested or upon request of the Commission staff, all assumptions made and the basis therefor, particularly with respect to the electrical height of the elements, current distribution along elements, efficiency of each element, and ground conductivity.

(v) Where waiver of the content of this section is requested, or upon request of the Commission staff, those formulas used for computing $E(\phi,\theta)_{th}$ and $E(\phi,\theta)_{std}$. Complete tabulation of final computed data used in plotting patterns, including data for the determination of the RMS value of the pattern, and the RSS field of the array.

(6) * * *

(vii) Additional requirements relating to modified standard patterns appear in Section 73.152(c)(3) and (c)(4).

* * * * *

24. Section 73.151 is amended by adding a new paragraph (b) to read as follows:

§73.151 Field strength measurements to establish performance of directional antennas.

* * * * *

(b) For stations authorized to operate with simple directional antenna systems (e.g., two towers) in the 1605-1705 kHz band, the measurements to support pattern RMS compliance referred to in (a)(1)(ii) and (a)(1)(iii) are not required. In such cases, measured radials are required only in the direction of short-spaced allotments, or in directions specifically identified by the

Commission.

25. Section 73.152 is amended by adding new paragraphs (c)(2)(iv), (c)(2)(iv)(A), and (c)(2)(iv)(B).

§73.152 Modification of directional antenna data for stations.

* * * * *

(c)(2)(iv) Where the measured inverse distance field exceeds the value permitted by the standard pattern, and augmentation is allowable under the terms of this section, the requested amount of augmentation shall be centered upon the azimuth of the radial upon which the excessive radiation was measured and shall not exceed the following:

(A) the actual measured inverse distance field value, where the radial does not involve a required monitoring point.

(B) 120% of the actual measured inverse field value, where the radial has a monitoring point required by the instrument of authorization.

Whereas some pattern smoothing can be accommodated, the extent of the requested span(s) shall be minimized and in no case shall a requested augmentation span extend to a radial azimuth for which the analyzed measurement data does not show a need for augmentation.

* * * * *

26. Section 73.153 is amended by revising the last sentence in the paragraph to read as follows:

§73.153 Field strength measurements in support of applications or evidence at hearings.

* * * The antenna resistance measurements required by Section 73.186 need not be taken or submitted.

27. Section 73.182 is revised to read as follows:

§73.182 Engineering standards of allocation.

(a) §§73.21 to 73.37, inclusive, govern allocation of facilities in the AM broadcast band 535-1705 kHz. §73.21 establishes three classes of channels in this band, namely, clear, regional and local. The classes and power of AM broadcast stations which will be assigned to the various channels are set forth in §73.21. The classifications of the AM broadcast stations are as follows:

(1) Class A stations operate on clear channels with powers no less than 10kW nor greater than

50 kW. These stations are designed to render primary and secondary service over an extended area, with their primary service areas protected from objectionable interference from other stations on the same and adjacent channels. Their secondary service areas are protected from objectionable interference from co-channel stations. For purposes of protection, Class A stations may be divided into two groups, those located in any of the contiguous 48 States and those located in Alaska in accordance with §73.25.

(i) The mainland U.S. Class A stations are those assigned to the channels allocated by §73.25. The power of these stations shall be 50 kW. The Class A stations in this group are afforded protection as follows:

(A) Daytime. To the 0.1 mV/m groundwave contour from stations on the same channel, and to the 0.5 mV/m groundwave contour from stations on adjacent channels.

(B) Nighttime. To the 0.5 mV/m-50% skywave contour from stations on the same channels.

(ii) Class A stations in Alaska operate on the channels allocated by §73.25 with a minimum power of 10 kW, a maximum power of 50 kW, and an antenna efficiency of 282 mV/m/kW at 1 kilometer. Stations operating on these channels in Alaska which have not been designated as Class A stations in response to licensee request will continue to be considered as Class B stations. During daytime hours a Class A station in Alaska is protected to the 100 μV/m groundwave contour from co-channel stations. During nighttime hours, a Class A station in Alaska is protected to the 100 μV/m-50 percent skywave contour from co-channel stations. The 0.5 mV/m groundwave contour is protected both daytime and nighttime from stations on adjacent channels.

NOTE: In the Report and Order in MM Docket No. 83-807, the Commission designated 15 stations operating on U.S. clear channels as Alaskan Class A stations. Eleven of these stations already have Alaskan Class A facilities and are to be protected accordingly. Permanent designation of the other four stations as Alaskan Class A is conditioned on their constructing minimum Alaskan Class A facilities no later than December 31, 1989. Until that date or until such facilities are obtained, these four stations shall be temporarily designated as Alaskan Class A stations, and calculations involving these stations should be based on existing facilities but with an assumed power of 10 kW. Thereafter, these stations are to be protected based on their actual Alaskan Class A facilities. If any of these stations does not obtain Alaskan Class A facilities in the period specified, it is to be protected as a Class B station based on its actual facilities. These four stations may increase power to 10 kW without regard to the impact on co-channel Class B stations. However, power increases by these stations above 10 kW (or by existing Alaskan Class A stations beyond their current power level) are subject to applicable protection requirements for co-channel Class B stations. Other stations not on the original list but which meet applicable requirements may obtain Alaskan Class A status by seeking such designation from the Commission. If a power increase or other change in facilities by a station not on the original list is required to obtain minimum Alaskan Class A facilities, any such application shall meet the interference protection requirements applicable to an Alaskan Class A proposal on the

channel.

(2) Class B stations are stations which operate on clear and regional channels with powers not less than 0.25 kW nor more than 50 kW. These stations render primary service only, the area of which depends on their geographical location, power, and frequency. It is recommended that Class B stations be located so that the interference received from other stations will not limit the service area to a groundwave contour value greater than 2.0 mV/m nighttime and to the 0.5 mV/m groundwave contour daytime, which are the values for the mutual protection between this class of stations and other stations of the same class.

NOTE: See §§73.21(b)(1) and 73.26(b) concerning power restrictions and classifications relative to Class B, Class C, and Class D stations in Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands. Stations in the above-named places that are reclassified from Class C to Class B stations under §73.26(b) shall not be authorized to increase power to levels that would increase the nighttime interference-free limit of co-channel Class C stations in the conterminous United States.

(3) Class C stations operate on local channels, normally rendering primary service to a community and the suburban or rural areas immediately contiguous thereto, with powers not less than 0.25 kW, nor more than 1 kW, except as provided in §73.21(c)(1). Such stations are normally protected to the daytime 0.5 mV/m contour. On local channels the separation required for the daytime protection shall also determine the nighttime separation. Where directional antennas are employed daytime by Class C stations operating with more than 0.25 kW power, the separations required shall in no case be less than those necessary to afford protection, assuming nondirectional operation with 0.25 kW. In no case will 0.25 kW or greater nighttime power be authorized to a station unable to operate nondirectionally with a power of 0.25 kW during daytime hours. The actual nighttime limitation will be calculated. For nighttime protection purposes, Class C stations in the 48 contiguous United States may assume that stations in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands operating on 1230, 1240, 1340, 1400, 1450, and 1490 kHz are Class C stations.

(4) Class D stations operate on clear and regional channels with daytime powers of not less than 0.25 kW (or equivalent RMS field of 141 mV/m at one kilometer if less than 0.25 kW) and not more than 50 kW. Class D stations that have previously received nighttime authority operate with powers of less than 0.25 kW (or equivalent RMS fields of less than 141 mV/m at one kilometer) are not required to provide nighttime coverage in accordance with §73.24(j) and are not protected from interference during nighttime hours. Such nighttime authority is permitted on the basis of full nighttime protection being afforded to all Class A and Class B stations.

(b) When a station is already limited by interference from other stations to a contour value greater than that normally protected for its class, the individual received limits shall be the established standard for such station with respect to interference from each other station.

(c) The four classes of AM broadcast stations have in general three types of service area, i.e., primary, secondary and intermittent. (See §73.14 for the definitions of primary, secondary, and

intermittent service areas.) Class A stations render service to all three areas. Class B stations render service to a primary area but the secondary and intermittent service areas may be materially limited or destroyed due to interference from other stations, depending on the station assignments involved. Class C and Class D stations usually have only primary service areas. Interference from other stations may limit intermittent service areas and generally prevents any secondary service to those stations which operate at night. Complete intermittent service may still be obtained in many cases depending on the station assignments involved.

(d) The groundwave signal strength required to render primary service is 2 mV/m for communities with populations of 2,500 or more and 0.5 mV/m for communities with populations of less than 2,500. See §73.184 for curves showing distance to various groundwave field strength contours for different frequencies and ground conductivities, and also see §73.183, "Groundwave signals."

(e) A Class C station may be authorized to operate with a directional antenna during daytime hours providing the power is at least 0.25 kW. In computing the degrees of protection which such antenna will afford, the radiation produced by the directional antenna system will be assumed to be no less, in any direction, than that which would result from non-directional operation using a single element of the directional array, with 0.25 kW.

(f) All classes of broadcast stations have primary service areas subject to limitation by fading and noise, and interference from other stations to the contours set out for each class of station.

(g) Secondary service is provided during nighttime hours in areas where the skywave field strength, 50% or more of the time, is 0.5 mV/m or greater (0.1 mV/m in Alaska). Satisfactory secondary service to cities is not considered possible unless the field strength of the skywave signal approaches or exceeds the value of the groundwave field strength that is required for primary service. Secondary service is subject to some interference and extensive fading whereas the primary service area of a station is subject to no objectionable interference or fading. Only Class A stations are assigned on the basis of rendering secondary service.

Note: Standards have not been established for objectionable fading because of the relationship to receiver characteristics. Selective fading causes audio distortion and signal strength reduction below the noise level, objectionable characteristics inherent in many modern receivers. The AVC circuits in the better designed receivers generally maintain the audio output at a sufficiently constant level to permit satisfactory reception during most fading conditions.

(h) Intermittent service is rendered by the groundwave and begins at the outer boundary of the primary service area and extends to a distance where the signal strength decreases to a value that is too low to provide any service. This may be as low as a few μV/m in certain areas and as high as several millivolts per meter in other areas of high noise level, interference from other stations, or objectionable fading at night. The intermittent service area may vary widely from day to night and generally varies over shorter intervals of time. Only Class A stations are protected from interference from other stations to the intermittent service area.

(i) Broadcast stations are licensed to operate unlimited time, limited time, daytime, share time, and specified hours. (See §73.1710, 73.1725, 73.1720, 73.1715, and 73.1730.) Applications for new stations shall specify unlimited time operation only.

(j) §73.24 sets out the general requirements for modifying the facilities of a licensed station and for establishing a new station. §§73.24(b) and 73.37 include interference related provisions that be considered in cnnection with an application to modify the facilities of an existing station or to establish a new station. §73.30 describes the procedural steps required to receive an authorization to operate in the 1605-1705 kHz band.

(k) Objectionable nighttime interference from a broadcast station occurs when, at a specified field strength contour with respect to the desired station, the field strength of an undesired station (co-channel or first adjacent channel, after application of proper protection ratio) exceeds for 10% or more of the time the values set forth in these standards. The value derived from the root-sum-square of all interference contributions represents the extent of a station's interference-free coverage.

(1) With respect to the root-sum-square (RSS) values of interfering field strengths referred to in this section, calculation of nighttime interference-free service is accomplished by considering the signals on the three channels of concern (co- and first adjacencies) in order of decreasing magnitude, adding the squares of the values and extracting the square root of the sum, excluding those signals which are less than 50% of the RSS values of the higher signals already included.

(2) With respect to the root-sum-square values of interfering field strengths referred to in this section, calculation of nighttime interference for non-coverage purposes is accomplished by considering the signals on the three channels of concern (co- and first adjacencies) in order of decreasing magnitude, adding the squares of the values and extracting the square root of the sum, excluding those signals which are less than 25% of the RSS values of the higher signals already included.

(3) With respect to the root-sum-square values of interfering field strengths referred to in this section, calculation is accomplished by considering the signals on the three channels of concern (co- and first adjacencies) in order of decreasing magnitude, adding the squares of the values and extracting the square root of the sum. The 0% exclusion method applies only to the determination of an improvement factor value for evaluating a station's eligibility for migration to the band 1605-1705 kHz.

(4) The RSS value of the nighttime interference-free contour will not be considered to be increased when a new interfering signal is added which is less than 50% of the RSS value of the interference from existing stations, and which at the same time is not greater than the smallest signal included in the RSS value of interference from existing stations.

(5) It is recognized that application of the above "50% exclusion". method (or any exclusion method using a per cent value greater than zero) of calculating the RSS interference may result

in some cases in anomalies wherein the addition of a new interfering signal or the increase in value of an existing interfering signal will cause the exclusion of a previously included signal and may cause a decrease in the calculated RSS value of interference. In order to provide the Commission with more realistic information regarding gains and losses in service (as a basis for determination of the relative merits of a proposed operation) the following alternate method for calculating the proposed RSS values of interference will be employed wherever applicable.

(6) In the cases where it is proposed to add a new interfering signal which is not less than 50% (or 25%, depending on which study is being performed) of the RSS value of interference from existing stations or which is greater that the smallest signal already included to obtain this RSS value, the RSS limitation after addition of the new signal shall be calculated without excluding any signal previously included. Similarly, in cases where it is proposed to increase the value of one of the existing interfering signals which has been included in the RSS value, the RSS limitation after the increase shall be calculated without excluding the interference from any source previously included.

(7) If the new or increased signal proposed in such cases is ultimately authorized, the RSS values of interference to other stations affected will thereafter be calculated by the "50% exclusion" (or 25% exclusion, depending on the which study is being performed) method without regard to this alternate method of calculation.

(8) Examples of RSS interference calculations:

(i) Existing interferences:

Station No. 1 - 1.00 mV/m.
Station No. 2 - 0.60 mV/m.
Station No. 3 - 0.59 mV/m.
Station No. 4 - 0.58 mV/m.

The RSS value from Nos. 1, 2 and 3 is 1.31 mV/m; therefore interference from No. 4 is excluded for it is less than 50% of 1.31 mV/m.

(ii) Station A receives interference from:

Station No. 1 - 1.00 mV/m.
Station No. 2 - 0.60 mV/m.
Station No. 3 - 0.59 mV/m.

It is proposed to add a new limitation, 0.68 mV/m. This is more than 50% of 1.31 mV/m, the RSS value of Nos. 1, 2 and 3. The RSS value of Station No. 1 and of the proposed station would be 1.21 mV/m which is more than twice as large as the limitation from Station No. 2 or No. 3. However, under the above provision the new signal and the three existing interferences are nevertheless calculated for purposes of comparative studies, resulting in an RSS value of 1.47

mV/m. However, if the proposed station is ultimately authorized, only No. 1 and the new signal are included in all subsequent calculations for the reason that Nos. 2 and 3 are less than 50% of 1.21 mV/m, the RSS value of the new signal and No. 1.

(iii) Station A receives interference from:

Station No. 1 - 1.00 mV/m.
Station No. 2 - 0.60 mV/m.
Station No. 3 - 0.59 mV/m.

No. 1 proposes to increase the limitation it imposes on Station A to 1.21 mV/m. Although the limitations from stations Nos. 2 and 3 are less than 50% of the 1.21 mV/m limitation, under the above provision they are nevertheless included for comparative studies, and the RSS limitation is calculated to be 1.47 mV/m. However, if the increase proposed by Station No. 1 is authorized, the RSS value then calculated is 1.21 mV/m because Stations Nos. 2 and 3 are excluded in view of the fact that the limitations they impose are less than 50% of 1.21 mV/m.

Note: The principles demonstrated in the previous examples for the calculation of the 50% exclusion method also apply to calculations using the 25% exclusion method after appropriate adjustment.

(l) Objectionable nighttime interference from a station shall be considered to exist to a station when, at the field strength contour specified in paragraph (q) of this section with respect to the class to which the station belongs, the field strength of an interfering station operating on the same channel or on a first adjacent channel after signal adjustment using the proper protection ratio, exceeds for 10% or more of the time the value of the permissible interfering signal set forth opposite such class in paragraph (q) of this section.

(m) For the purpose of estimating the coverage and the interfering effects of stations in the absence of field strength measurements, use shall be made of Figure 8 of §73.190, which describes the estimated effective field (for 1 kW power input) of simple vertical omnidirectional antennas of various heights with ground systems having at least 120 quarter-wavelength radials. Certain approximations, based on the curve or other appropriate theory, may be made when other than such antennas and ground systems are employed, but in any event the effective field to be employed shall not be less than the following:

Class of Station	Effective Field (at 1 km)
All Class A (except Alaskan) Class A (Alaskan), B and D Class C	362 mV/m 282 mV/m 241 mV/m
Note (1): When a directional antenna is employed, the radiated signal of a broadcasting station will vary in strength in different directions, possibly being greater than the above values in certain directions and less in other directions depending upon the design and adjustment of the directional antenna system. To determine the interference in any direction, the measured or calculated radiated field (unattenuated field strength at 1 kilometer from the array) must be used in conjunction with the appropriate propagation curves. (See §73.185 for further discussion and solution of a typical directional antenna case.) Note (2): For Class B stations in Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands, 241 mV/m shall be used.	

(n) The existence or absence of objectionable groundwave interference from stations on the same or adjacent channels shall be determined by actual measurements made in accordance with the method described in §73.186, or in the absence of such measurements, by reference to the propagation curves of §73.184. The existence or absence of objectionable interference due to skywave propagation shall be determined by reference to Formula 2 in §73.190.

(o) Computation of Skywave Field Strength Values:

(1) Fifty Percent Skywave Field Strength Values (Clear Channel). In computing the fifty percent skywave field strength values of a Class A clear channel station, use shall be made of Formula 1 of §73.190, entitled "Skywave Field Strength" for 50 percent of the time.

(2) Ten Percent Skywave Field Strength Values. In computing the 10% skywave field strength for stations on a single signal or an RSS basis, Formula 2 in §73.190 shall be used.

(3) Determination of Angles of Departure. In calculating skywave field strength for stations on all channels, the pertinent vertical angle shall be determined by use of the formula in §73.190(d).

(p) The distance to any specified groundwave field strength contour for any frequency may be determined from the appropriate curves in §73.184 entitled "Ground Wave Field Strength vs. Distance."

(q) Normally protected service contours and permissible interference signals for broadcast stations are as follows (for Class A stations, see also paragraph (a) of this section):

Class of Station	Class of Channel Used	Signal Strength Contour of Area Protected from Objectionable Interference 1/ (μV/m)		Permissible Interfering Signal (μV/m)	
		Day 2/	Night	Day 2/	Night 3/
A	Clear	SC 100 AC 500	SC 500 50% SW AC 500 GW	SC 5 AC 250	SC 25 AC 250
A (Alaskan)	do	SC 100 AC 500	SC 100 50% SW AC 500 GW	SC 5 AC 250	SC 5 AC 250
B	Clear Regional	500	2000 2/	25 AC 250	25 250
C	Local	500	Not presc. 4/	SC 25	Not presc.
D	Clear Regional	500	Not presc.	SC 25 AC 250	Not presc.

1/ When a station is already limited by interference from other stations to a contour of higher value than that normally protected for its class, this higher value contour shall be the established protection standard for such station. Changes proposed by Class A and B stations shall be required to comply with the following restrictions. Those interferers that contribute to another station's RSS using the 50% exclusion method are required to reduce their contribution to that RSS by 10%. Those lesser interferers that contribute to a station's RSS using the 25% exclusion method but do not contribute to that station's RSS using the 50% exclusion method may make changes not to exceed their present contribution. Interferers not included in a station's RSS using the 25% exclusion method are permitted to increase radiation as long as the 25% exclusion threshold is not equalled or exceeded. In no case will a reduction be required that would result in a contributing value that is below the pertinent value specified in the table.

2/ Groundwave.

3/ Skywave field strength for 10 percent or more of the time.

4/ During nighttime hours, Class C stations in the contiguous 48 States may treat all Class B stations assigned to 1230, 1240, 1340, 1400, 1450 and 1490 kHz in Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands as if they were Class C stations.

Note: SC = Same channel; AC = Adjacent channel; SW = Skywave; GW = Groundwave

(r) The following table of logarithmic expressions is to be used as required for determining the minimum permissible ratio of the field strength of a desired to an undesired signal. This table shall be used in conjunction with the protected contours specified in paragraph (q).

Frequency Separation of Desired to Undesired Signals (kHz)	Desired Groundwave to:		Desired 50% Skywave to Undesired 10% Skywave (dB)
	Undesired Groundwave (dB)	Undesired 10% Skywave (dB)	
0	26	26	26
10	6	6	not presc.

(s) Two stations, one with a frequency twice that of the other, should not be assigned in the same groundwave service area unless special precautions are taken to avoid interference from the second harmonic of the station operating on the lower frequency. Additionally, in selecting a frequency, consideration should be given to the fact that occasionally the frequency assignment of two stations in the same area may bear such a relation to the intermediate frequency of some broadcast receivers as to cause "image" interference. However, since this can usually be rectified by readjustment of the intermediate frequency of such receivers, the Commission, in general, will not take this kind of interference into consideration when authorizing stations.

(t) The groundwave service of two stations operating with synchronized carriers and broadcasting identical programs will be subject to some distortion in areas where the signals from the two stations are of comparable strength. For the purpose of estimating coverage of such stations, areas in which the signal ratio is between 1:2 and 2:1 will not be considered as receiving satisfactory service.

Note: Two stations are considered to be operated synchronously when the carriers are maintained within 0.2 Hz of each other and they transmit identical programs.

28. Section 73.183 is amended by removing paragraph (b) and adding the note that follows paragraph (a), and by redesignating paragraphs (c) through (f) as (b) through (e), and revising new paragraphs (c) and (e) to read as follows:

§73.183 Groundwave signals.

(a) * * *

Note: Groundwave field strength measurements will not be accepted or considered for the purpose of establishing that interference to a station in a foreign country other than Canada, or that the field strength at the border thereof, would be less than indicated by the use of the ground

conductivity maps and engineering standards contained in this part and applicable international agreements. Satisfactory groundwave measurements offered for the purpose of demonstrating values of conductivity other than those shown by Figure M3 in problems involving protection of Canadian stations will be considered only if, after review thereof, the appropriate agency of the Canadian government notifies the Commission that they are acceptable for such purpose.

* * * * *

(c) Example of determining interference by the graphs in §73.184:

It is desired to determine whether objectionable interference exists between a proposed 5 kW Class B station on 990 kHz and an existing 1 kW Class B station on first adjacent channel, 1000 kHz. The distance between the two stations is 260 kilometers and both stations operate nondirectionally with antenna systems that produce a horizontal effective field of 282 mV/m at one kilometer. (See §73.185 regarding of use of directional antennas.) The ground conductivity at the site of each station and along the intervening terrain is 6 mS/m. The protection to Class B stations during daytime is to the 500 μV/m (0.5 mVm) contour using a 6 dB protection factor. The distance to the 500 μV/m groundwave contour of the 1 kW station is determined by the use of the appropriate curve in §73.184. Since the curve is plotted for 100 mV/m at a 1 kilometer, to find the distance to the 0.5 mV/m contour of the 1 kw station, it is necessary to determine the distance to the 0.1773 m/Vm contour.

(100 X 0.5/282 = 0.1773)

Using the 6 mS/m curve, the estimated radius of the 0.5 mV/m contour is 62.5 kilometers. Subtracting this distance from the distance between the two stations leaves 197.5 kilometers. Using the same propagation curve, the signal from the 5 kW station at this distance is seen to be 0.059 mV/m. Since a protection ratio of 6 dB, desired to undesired signal, applies to stations separated by 10 kHz, the undesired signal could have had a value of up to 0.25 mV/m without causing objectionable interference. For co-channel studies, a desired to undesired signal ratio of no less than 20:1 (26 dB) is required to avoid causing objectionable interference.

(d) * * *

(e) Example of the use of the equivalent distance method:

It is desired to determine the distance to the 0.5 mV/m and 0.025 mV/m contours of a station on a frequency of 1000 kHz with an inverse distance field of 100 mV/m at one kilometer being radiated over a path having a conductivity of 10 mS/m for a distance of 20 kilometers, 5 mS/m for the next 30 kilometers and 15 mSm/m thereafter. Using the appropriate curve in §73.184, Graph 12, at a distance of 20 kilometers on the curve for 10 mS/m, the field strength is found to be 2.84 mV/m. On the 5mS/m curve, the equivalent distance to this field strength is 14.92 kilometers, which is 5.08 (20 - 14.92) kilometers nearer to the transmitter. Continuing on the propagation curve, the distance to a field strength of 0.5 mV/m is found to be 36.11 kilometers.

The actual length of the path travelled, however, is 41.19 (36.11 + 5.08) kilometers. Continuing on this propagation curve to the conductivity change at 44.92 (50.00 - 5.08) kilometers, the field strength is found to be 0.304 mV/m. On the 15 mS/m propagation curve, the equivalent distance to this field strength is 82.94 kilometers, which changes the effective path length by 38.02 (82.94 - 44.92) kilometers. Continuing on this propagation curve, the distance to a field strength of 0.025 mV/m is seen to be 224.4 kilometers. The actual length of the path travelled, however, is 191.46 (224.4 + 5.08 - 38.02) kilometers.

29. Section 73.184 is amended by revising paragraph (a) and the note following paragraph (b), removing paragraph (c), and revising and redesignating paragraphs (d), (e), and (f) as (c), (d), and (e), to read as follows:

§73.184 Groundwave field strength charts.

(a) Graphs 1 to 20 show, for each of 20 frequencies, the computed values of groundwave field strength as a function of groundwave conductivity and distance from the source of radiation. The groundwave field strength is considered to be that part of the vertical component of the electric field which has not been reflected from the ionosphere nor from the troposphere. These 20 families of curves are plotted on log-log graph paper and each is to be used for the range of frequencies shown thereon. Computations are based on a dielectric constant of the ground (referred to air as unity) equal to 15 for land and 80 for sea water and for the ground conductivities (expressed in mS/m) given on the curves. The curves show the variation of the groundwave field strength with distance to be expected for transmission from a vertical antenna at the surface of a uniformly conducting spherical earth with the groundwave constants shown on the curves. The curves are for an antenna power of such efficiency and current distribution that the inverse distance (unattenuated) field is 100 mV/m at 1 kilometer. The curves are valid for distances that are large compared to the dimensions of the antenna for other than short vertical antennas.

(b) * * *

NOTE: The computed values of field strength versus distance used to plot Graphs 1 to 20 are available in tabular form. For information on obtaining copies of these tabulations call or write the Consumer Affairs Office, Federal Communications Commission, Washington, D.C. 20554, (202) 632-7000.

(c) Provided the value of the dielectric constant is near 15, the ground conductivity curves of Graphs 1 to 20 may be compared with actual field strenght measurement data to determine the appropriate values of the ground conductivity and the inverse distance field strength at 1 kilometer. This is accomplished by plotting the measured field strengths on transparent log-log graph paper similar to that used for Graphs 1 to 20 and superimposing the plotted graph over the Graph corresponding to the frequency of the station measured. The plotted graph is then shifted vertically until the plotted measurement data is best aligned with one of the conductivity curves on the Graph; the intersection of the inverse distance line on the Graph with the 1 kilometer

abscissa on the plotted graph determines the inverse distance field strength at 1 kilometer. For other values of dielectric constant, the following procedure may be used to determine the dielectric constant of the ground, the ground conductivity and the inverse distance field strength at 1 kilometer. Graph 21 gives the relative values of groundwave field strength over a plane earth as a function of the numerical distance p and phase angle b. On graph paper with coordinates similar to those of Graph 21, plot the measured values of field strength as ordinates versus the corresponding distances from the antenna in kilometers as abscissae. The data should be plotted only for distances greater than one wavelength (or, when this is greater, five times the vertical height of the antenna in the case of a nondirectional antenna or 10 times the spacing between the elements of a directional antenna) and for distances less than $80f^{1/3}$/MHz kilometers (i.e., 80 kilometers at 1 MHz). Then, using a light box, place the plotted graph over Graph 21 and shift the plotted graph vertically and horizontally (making sure that the vertical lines on both sheets are parallel) until the best fit with the data is obtained with one of the curves on Graph 21. When the two sheets are properly lined up, the value of the field strength corresponding to the intersection of the inverse distance line of Graph 21 with the 1 kilometer abscissa on the data sheet is the inverse distance field strength at 1 kilometer, and the values of the numerical distance at 1 kilometer, p_1, and of b are also determined. Knowing the values of b and p_1 (the numerical distance at one kilometer), we may substitute in the following approximate values of the ground conductivity and dielectric constant.

$$\chi = \frac{\pi}{p} \cdot \left(\frac{R}{\lambda}\right)_1 \cdot \cos b \qquad \text{(Eq. 1)}$$

$(R/\lambda)_1$ = Number of wavelengths in 1 kilometer,

* * *

f_{MHz} = frequency expressed in megahertz,

$$\varepsilon = \chi \tan b - 1 \qquad \text{(Eq. 3)}$$

ε = dielectric constant of the ground referred to air as unity.

First solve for χ by substituting the known values of p_1, $(R/\lambda)_1$, and cos b in equation (1). Equation (2) may then be solved for δ and equation (3) for ε. At distances greater than $80/f^{1/3}$ MHz kilometers the curves of Graph 21 do not give the correct relative values of field strength since the curvature of the earth weakens the field more rapidly than these plane earth curves would indicate. Thus, no attempt should be made to fit experimental data to these curves at the larger distances.

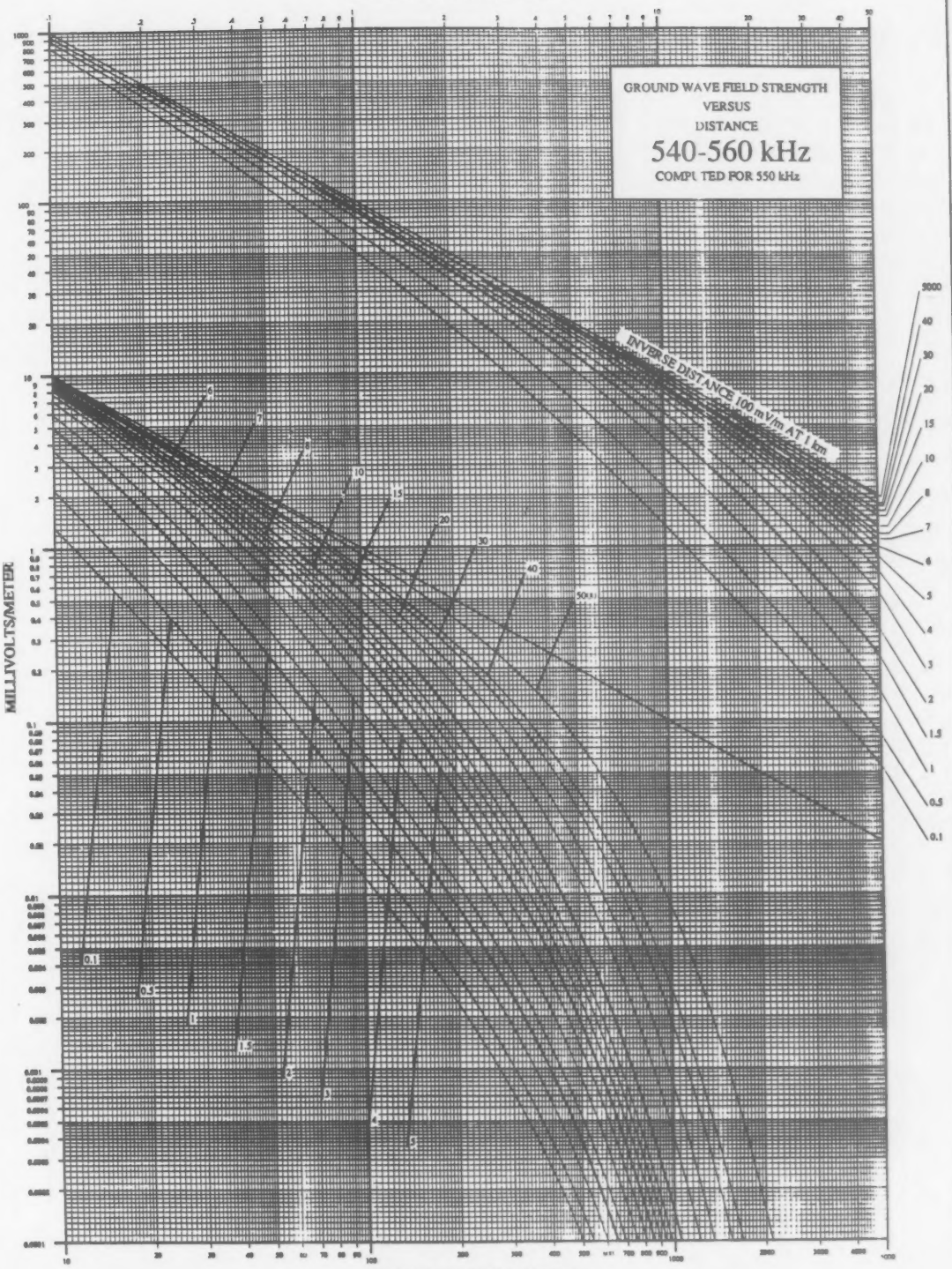
NOTE: For other values of dielectric constant, use can be made of the computer program which was employed by the FCC in generating the curves in Graphs 1 to 20. For information on obtaining a printout of this program, call or write the Consumer Affairs Office, Federal Communications Commission, Washington, D.C. 200554, (202) 632-7000.

(d) At sufficiently short distances (less than 55 kilometers at AM broadcast frequencies), such that the curvature of the earth does not introduce an additional attenuation of the waves, the curves of Graph 21 may be used to determine the groundwave field strength of transmitting and receiving antennas at the surface of the earth for any radiated power, frequency, or set of ground constants. First, trace the straight inverse distance line corresponding to the power radiated on transparent log-log graph paper similar to that of Graph 21, labelling the ordinates of the chart in terms of field strength, and the abscissae in terms of distance. Next, using the formulas given on Graph 21, calculate the value of the numerical distance, p, at 1 kilometer, and the value of b. Then superimpose the log-log graph paper over Graph 21, shifting it vertically until both inverse distance lines coincide and shifting it horizontally until the numerical distance at 1 kilometer on Graph 21 coincides with 1 kilometer on the log-log graph paper. The curve of Graph 21 corresponding to the calculated value of b is then traced on the log-log graph paper giving the field strength versus distance in kilometers.

(e) This paragraph consists of the following Graphs 1 to 20 and 21.

Note: The referenced graphs are not published in the CFR, nor will they be included in the Commission's automated rules system. For information on obtaining copies of the graphs call or write the Consumer Affairs Office, Federal Communications Commission, Washington, D.C. 20554, Telephone: (202) 632-7000.

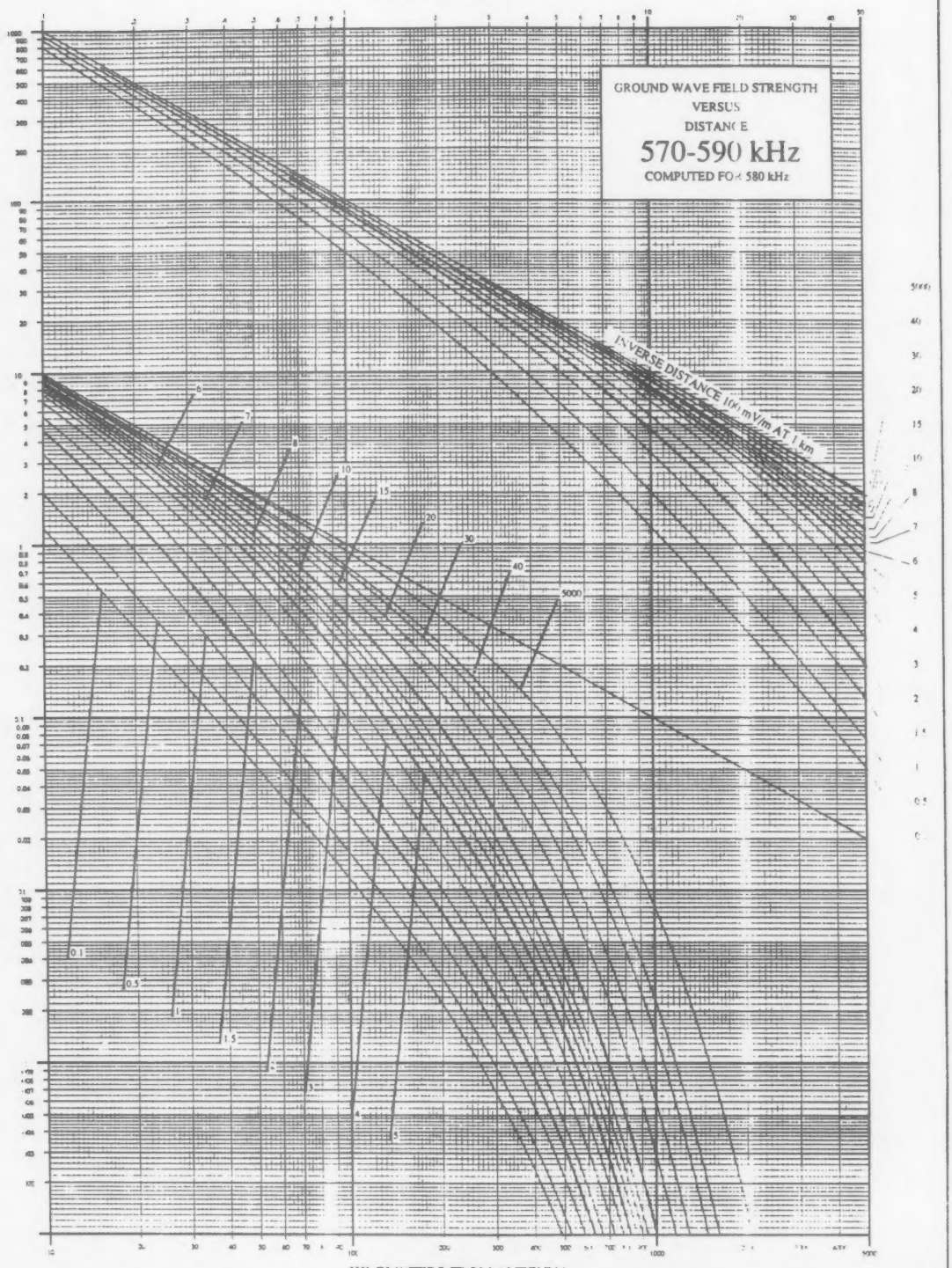
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

GRAPH 1

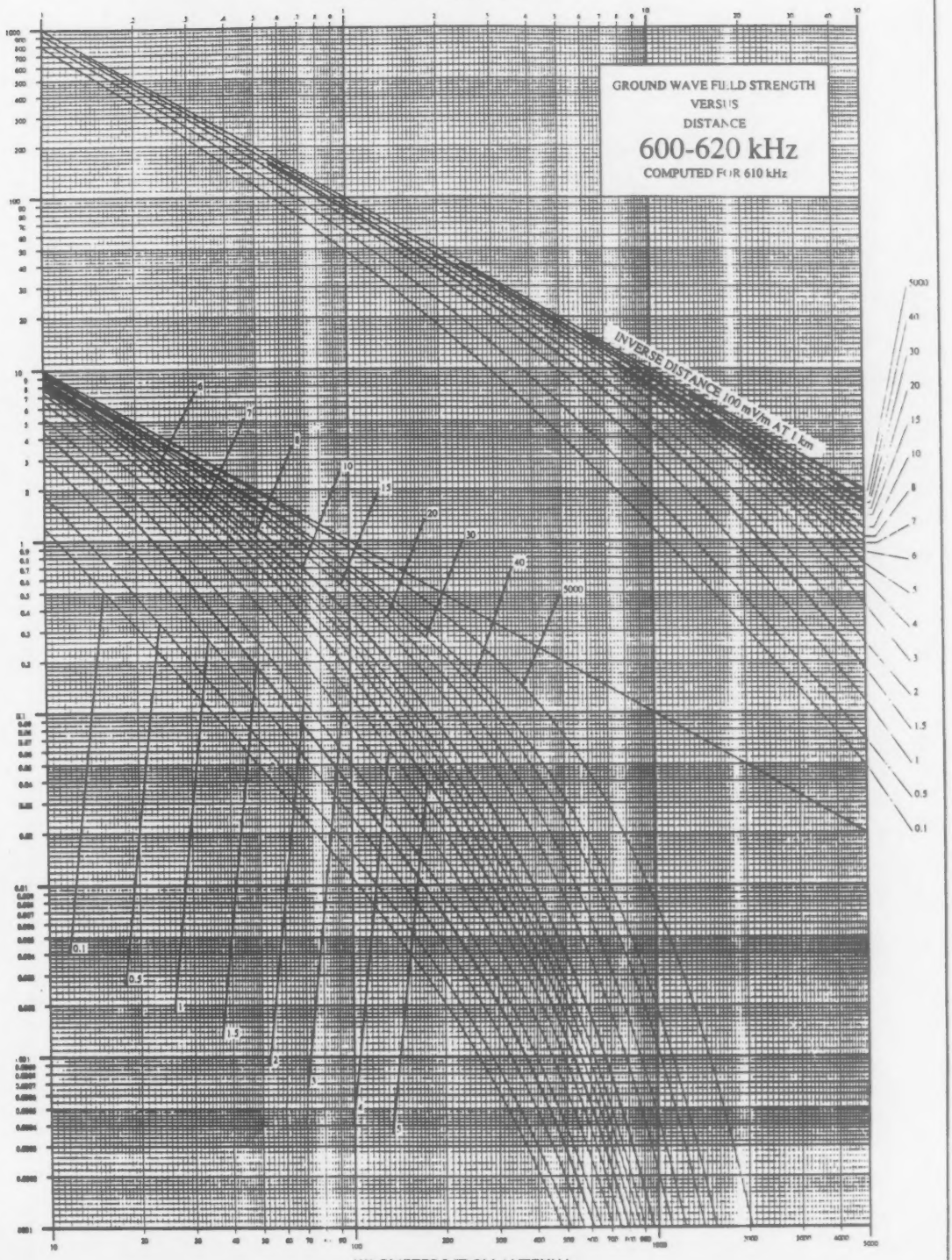
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

GRAPH 2

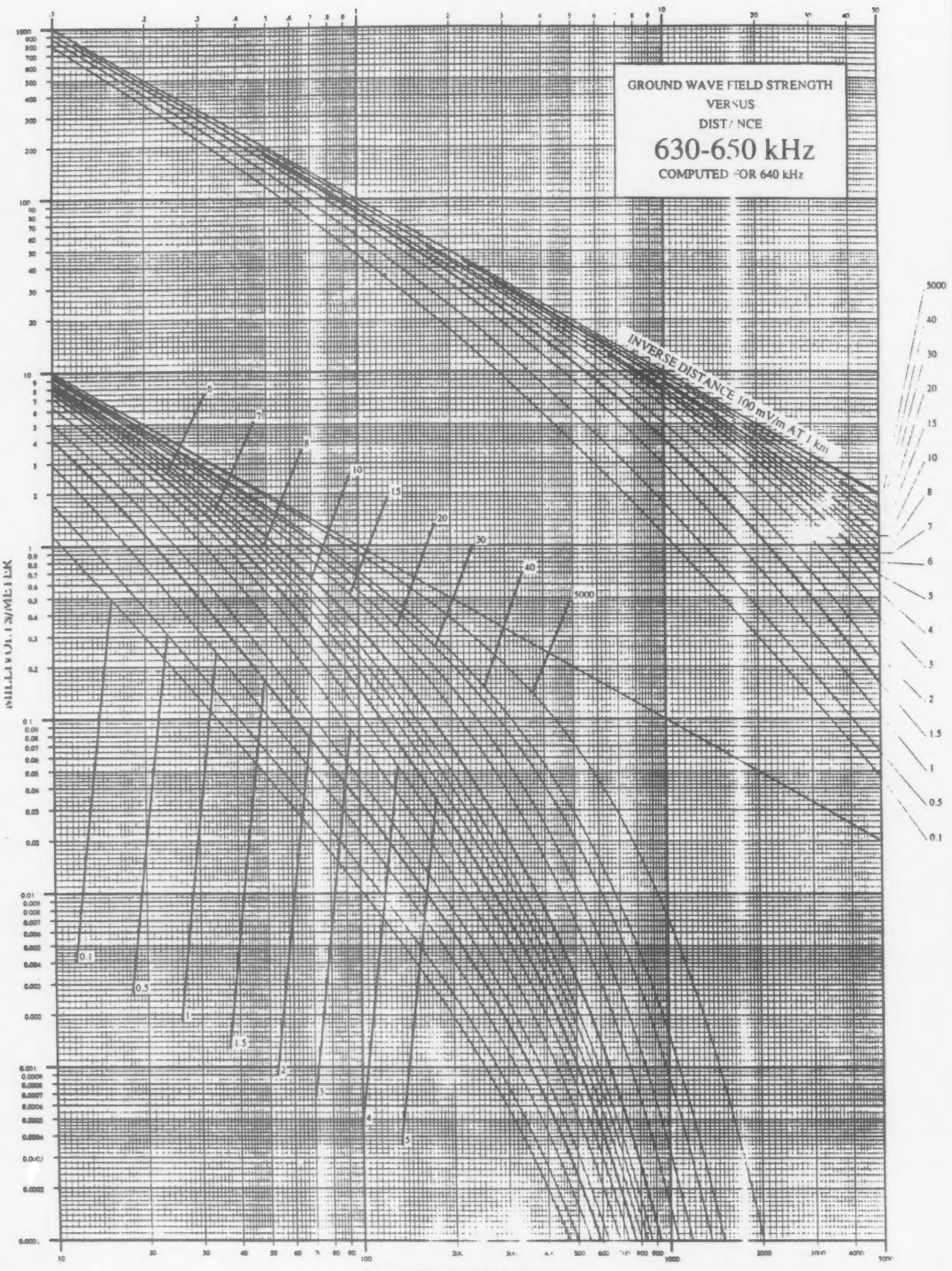
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

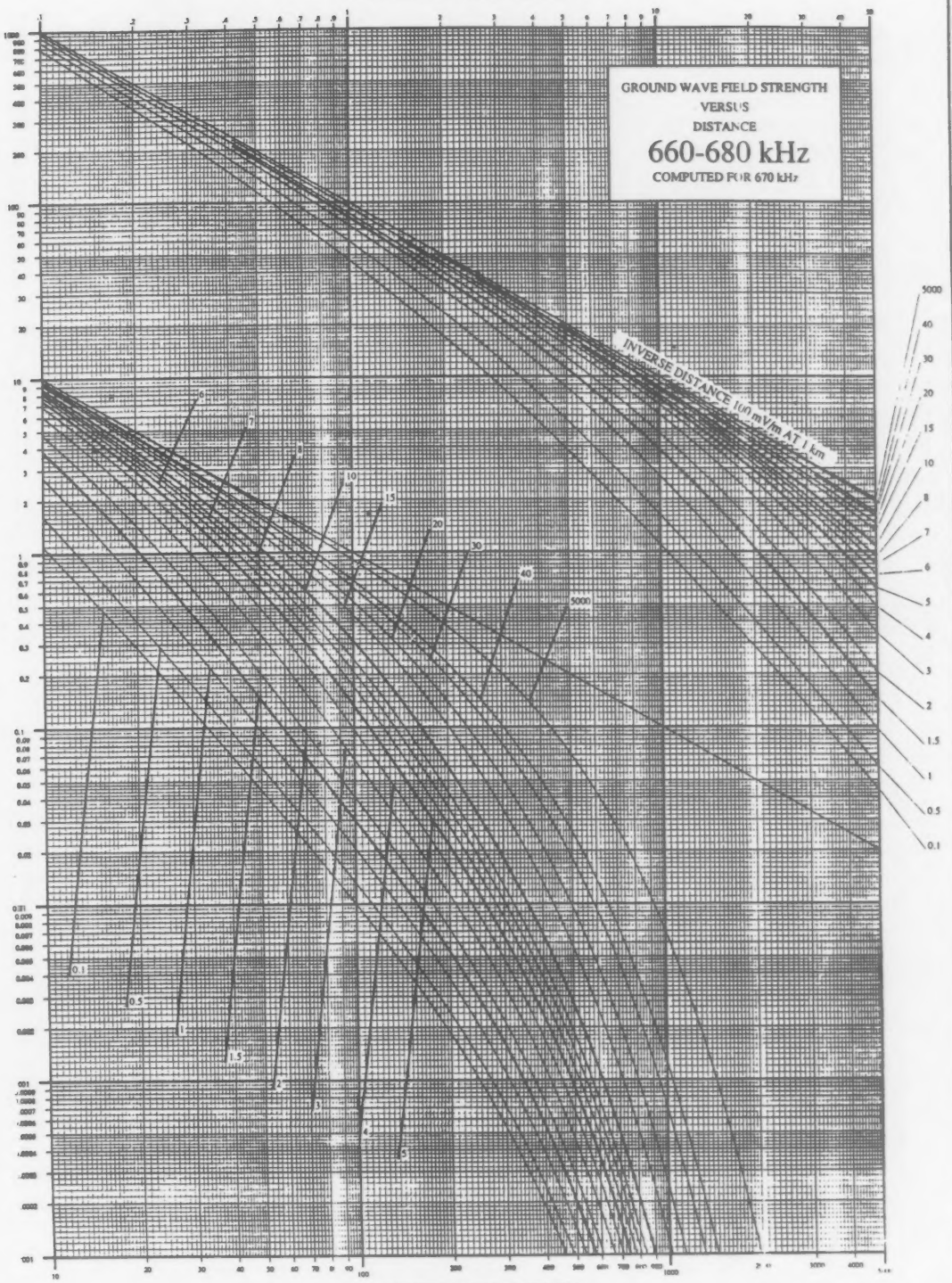
GRAPH 3

KILOMETERS FROM ANTENNA



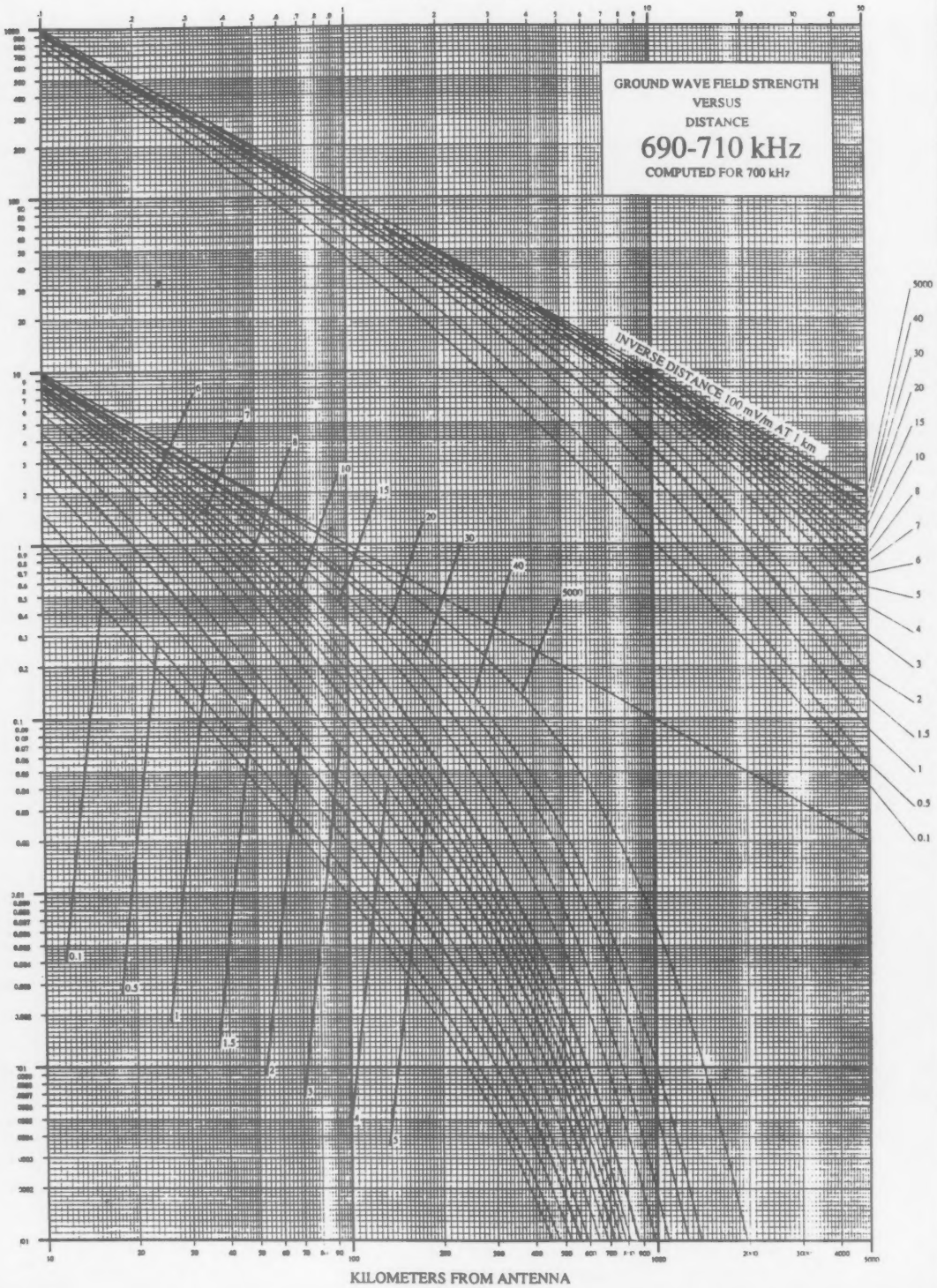
GRAPH 4

KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA
GRAPH 5

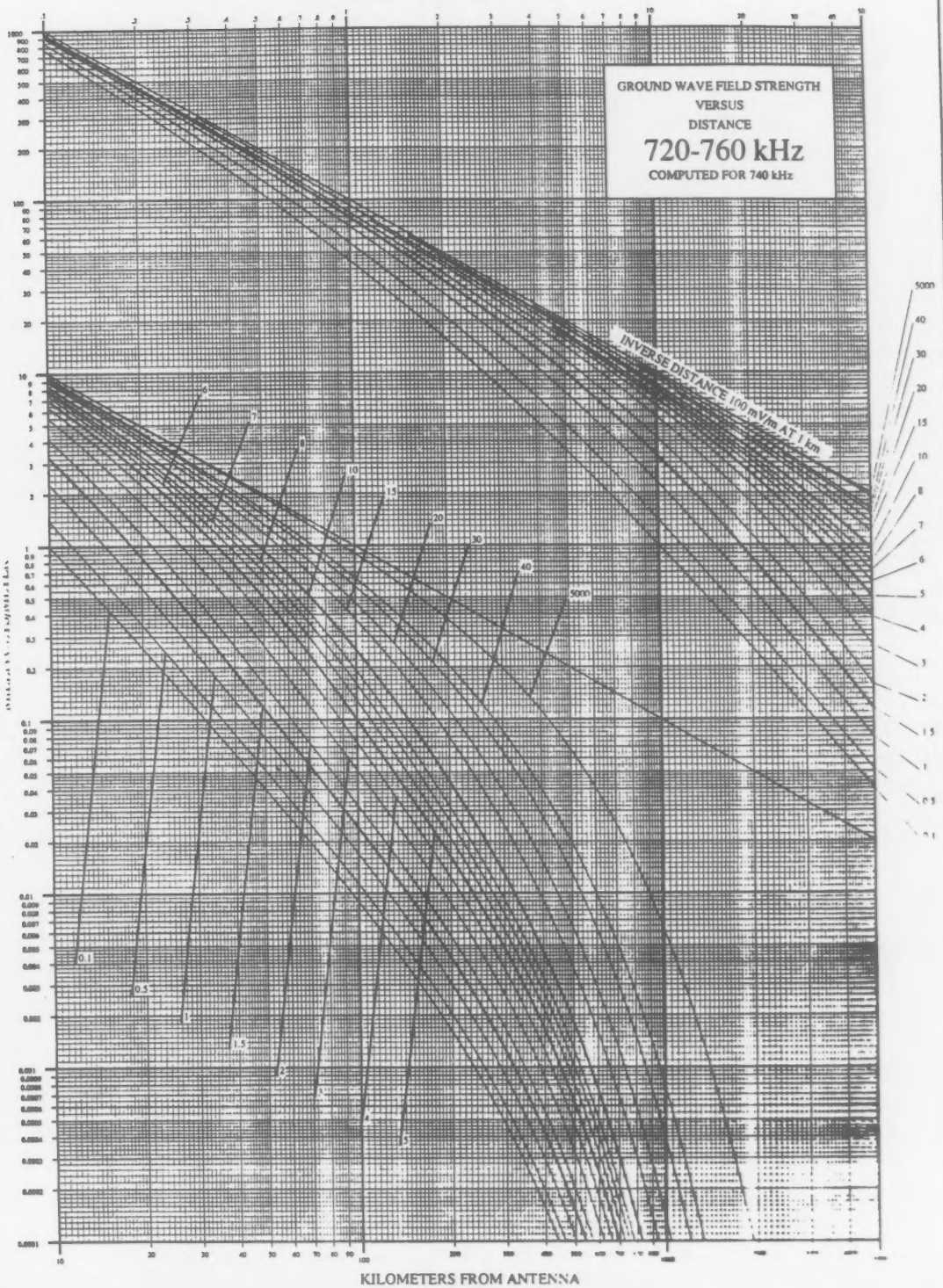
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

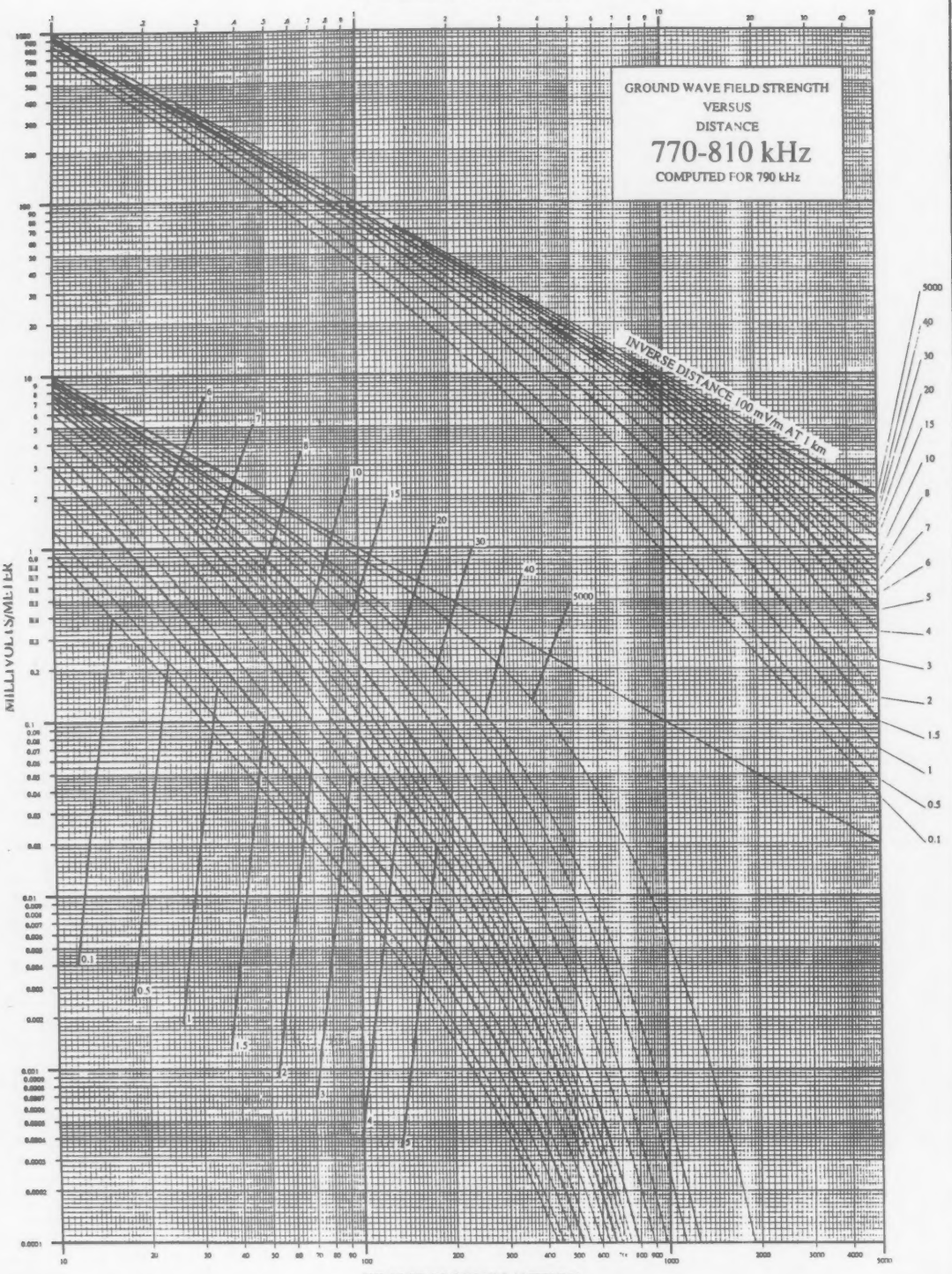
GRAPH 6

KILOMETERS FROM ANTENNA



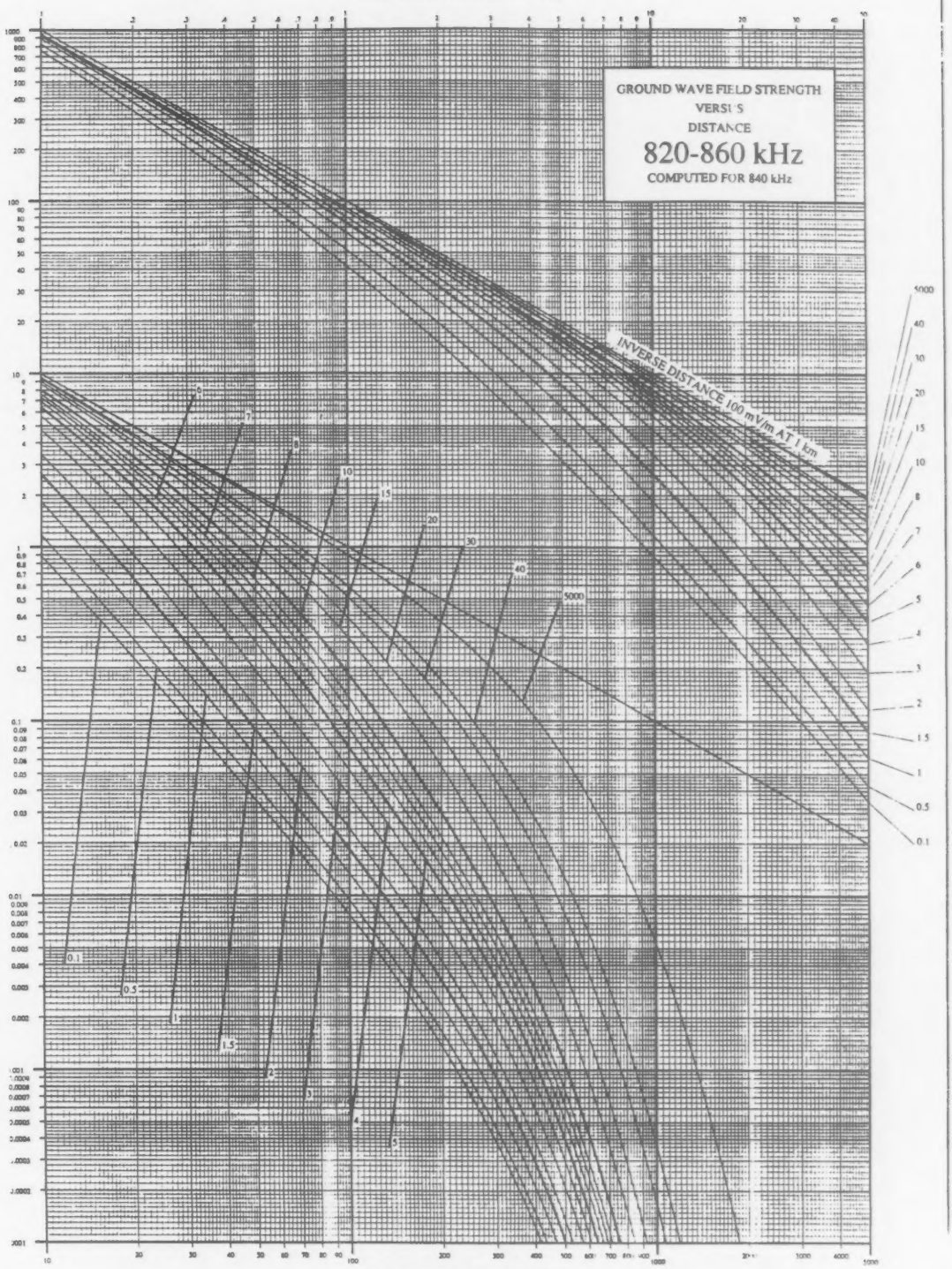
KILOMETERS FROM ANTENNA
GRAPH 7

KILOMETERS FROM ANTENNA



GRAPH 8

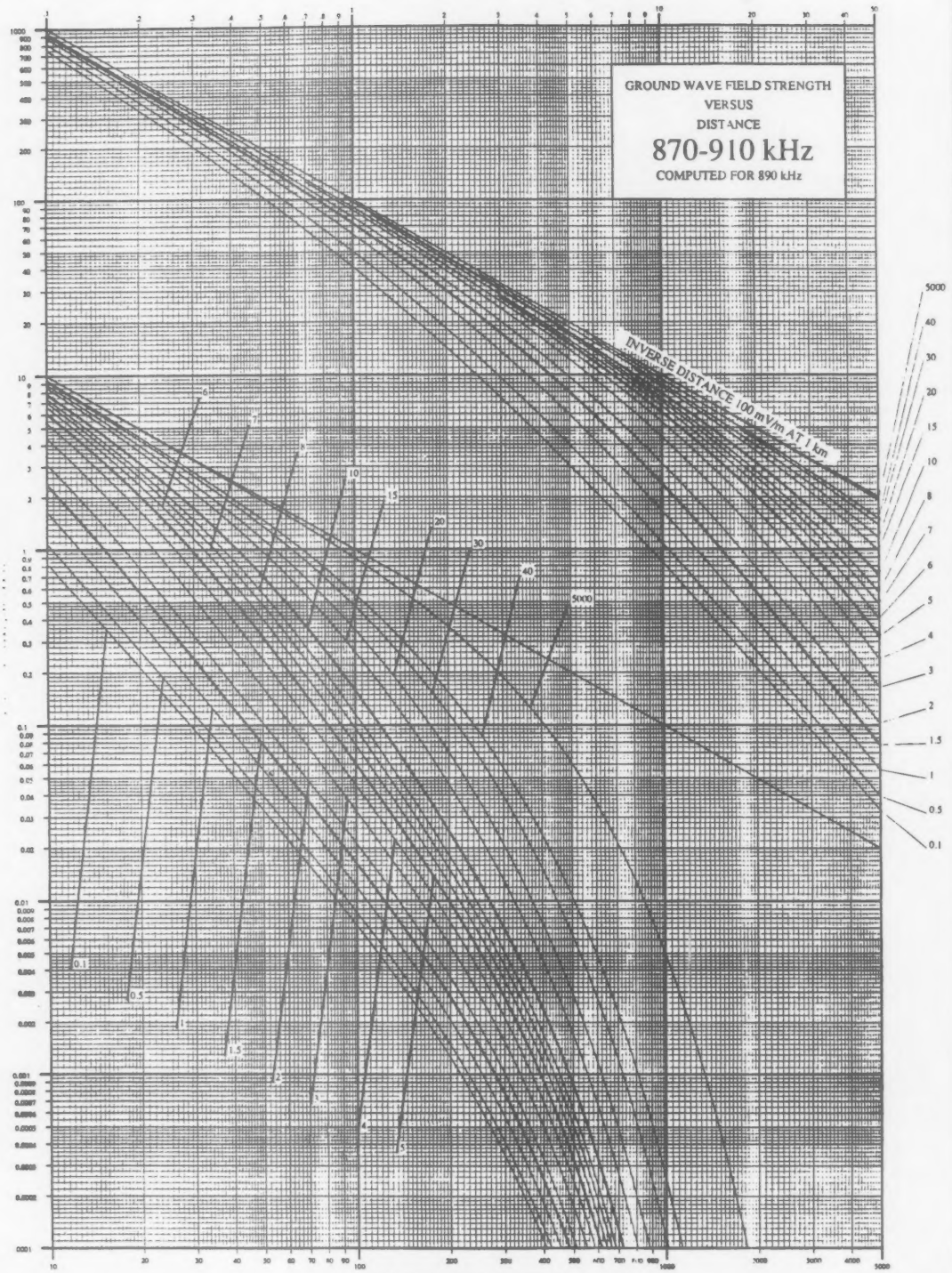
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

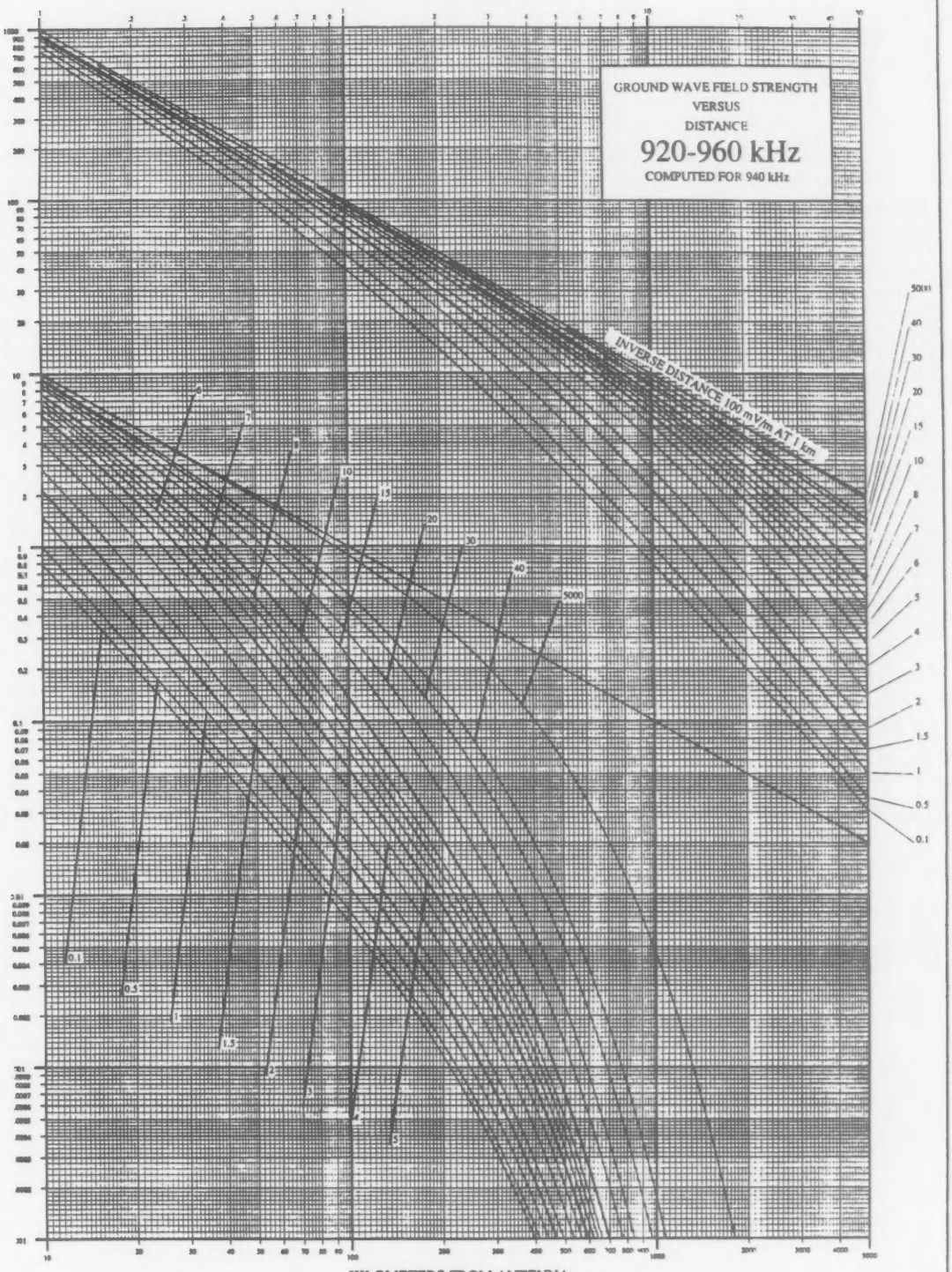
GRAPH 9

KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA
GRAPH 10

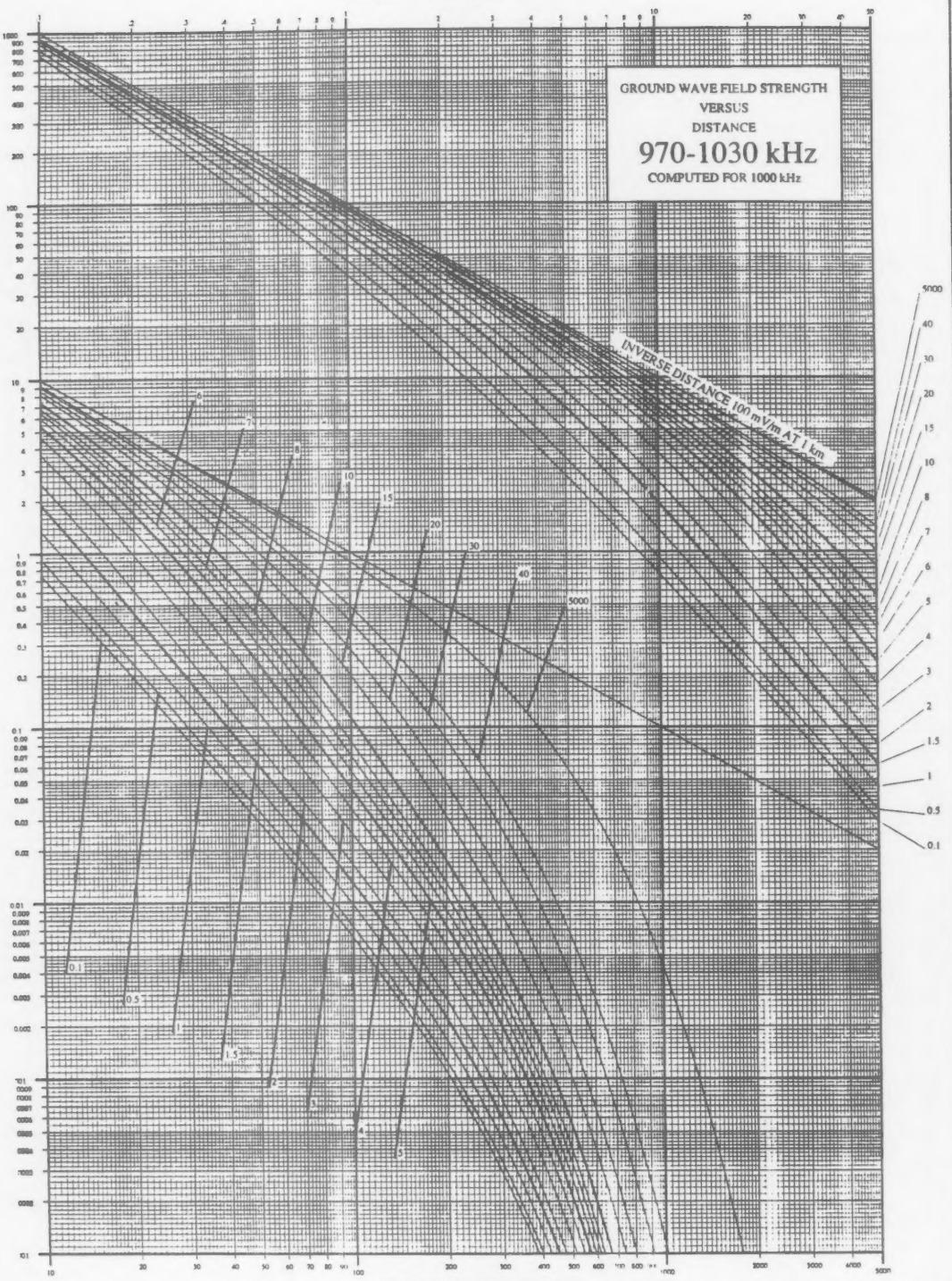
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

GRAPH 11

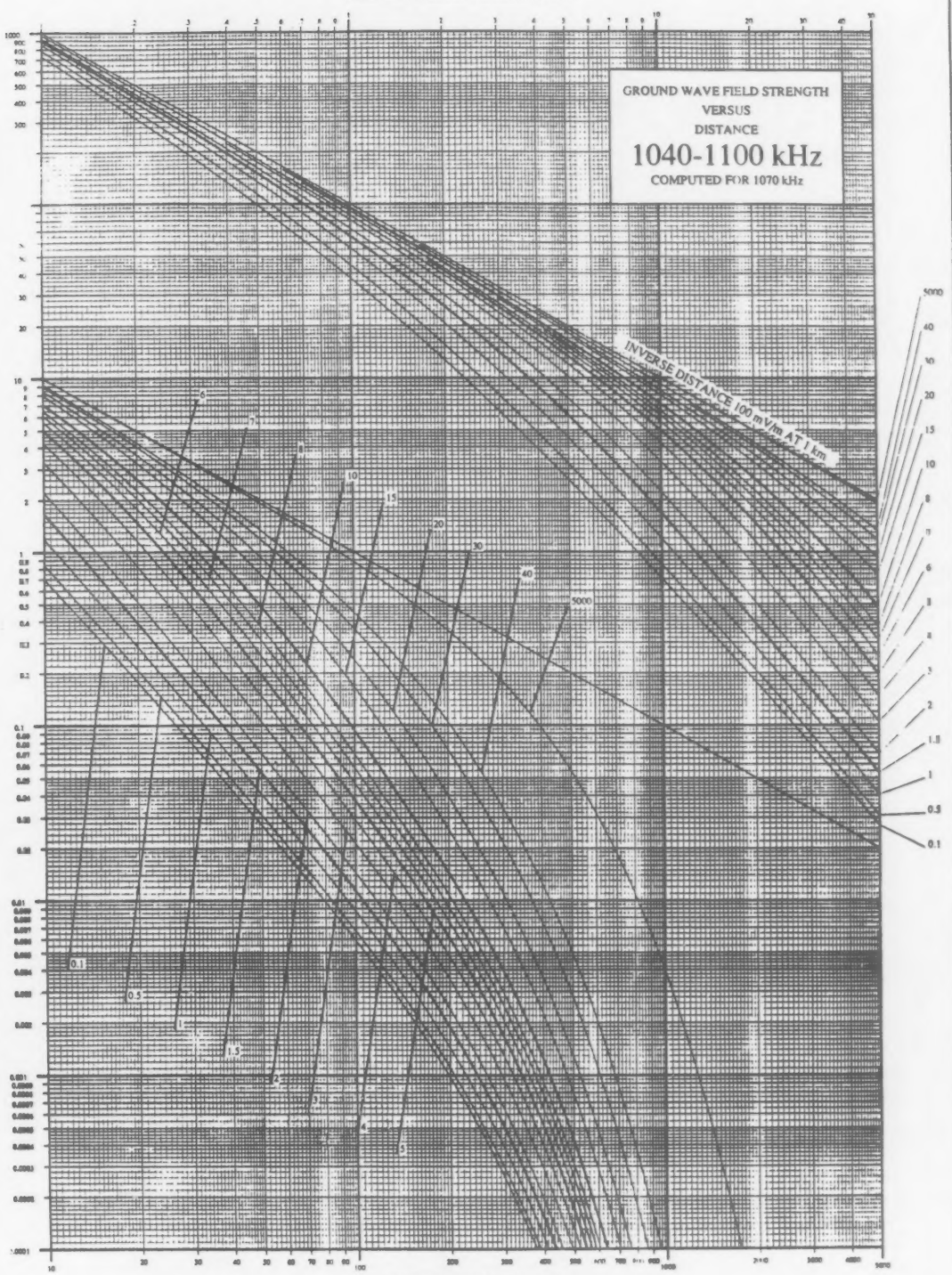
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

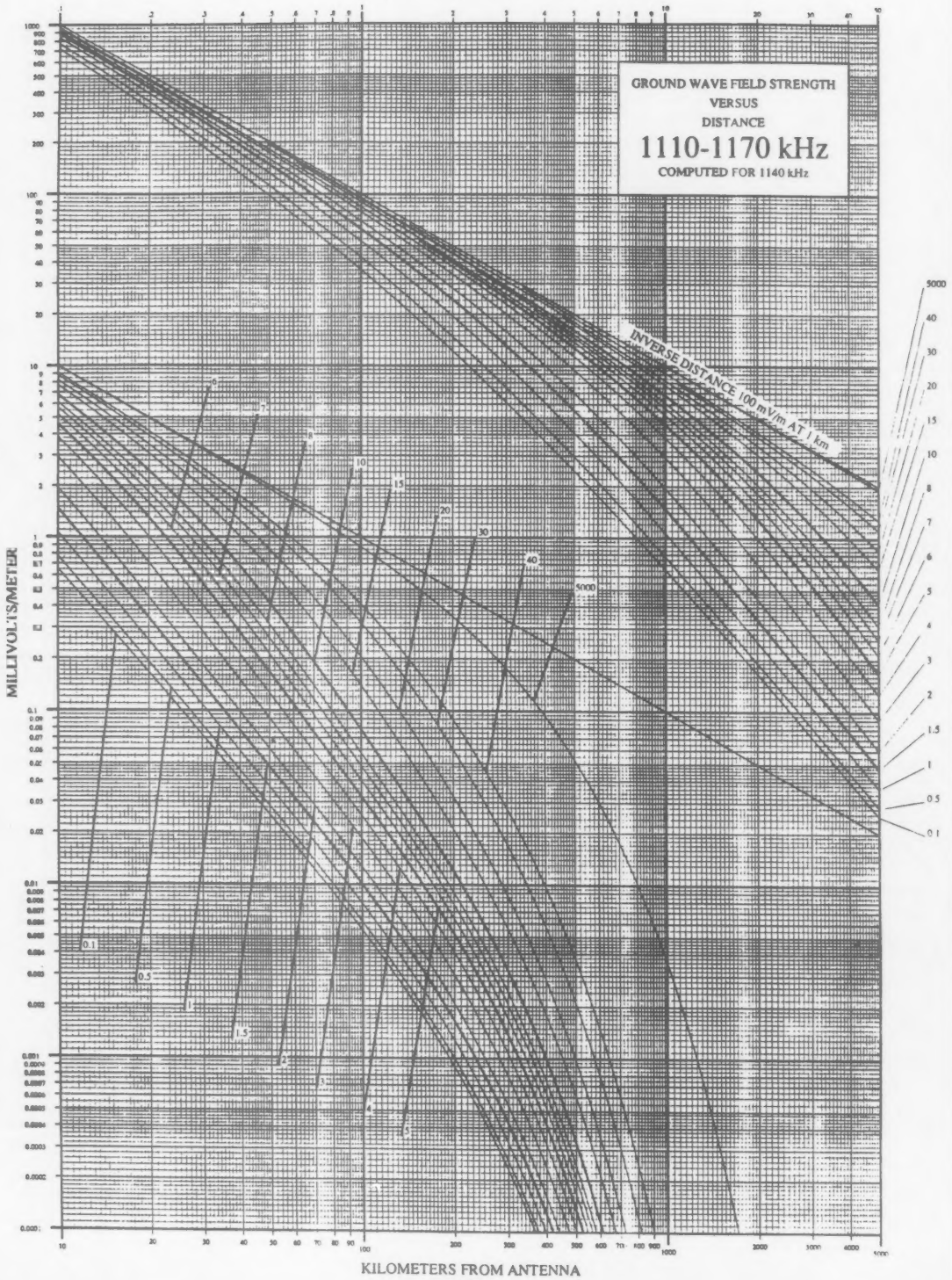
GRAPH 12

KILOMETERS FROM ANTENNA



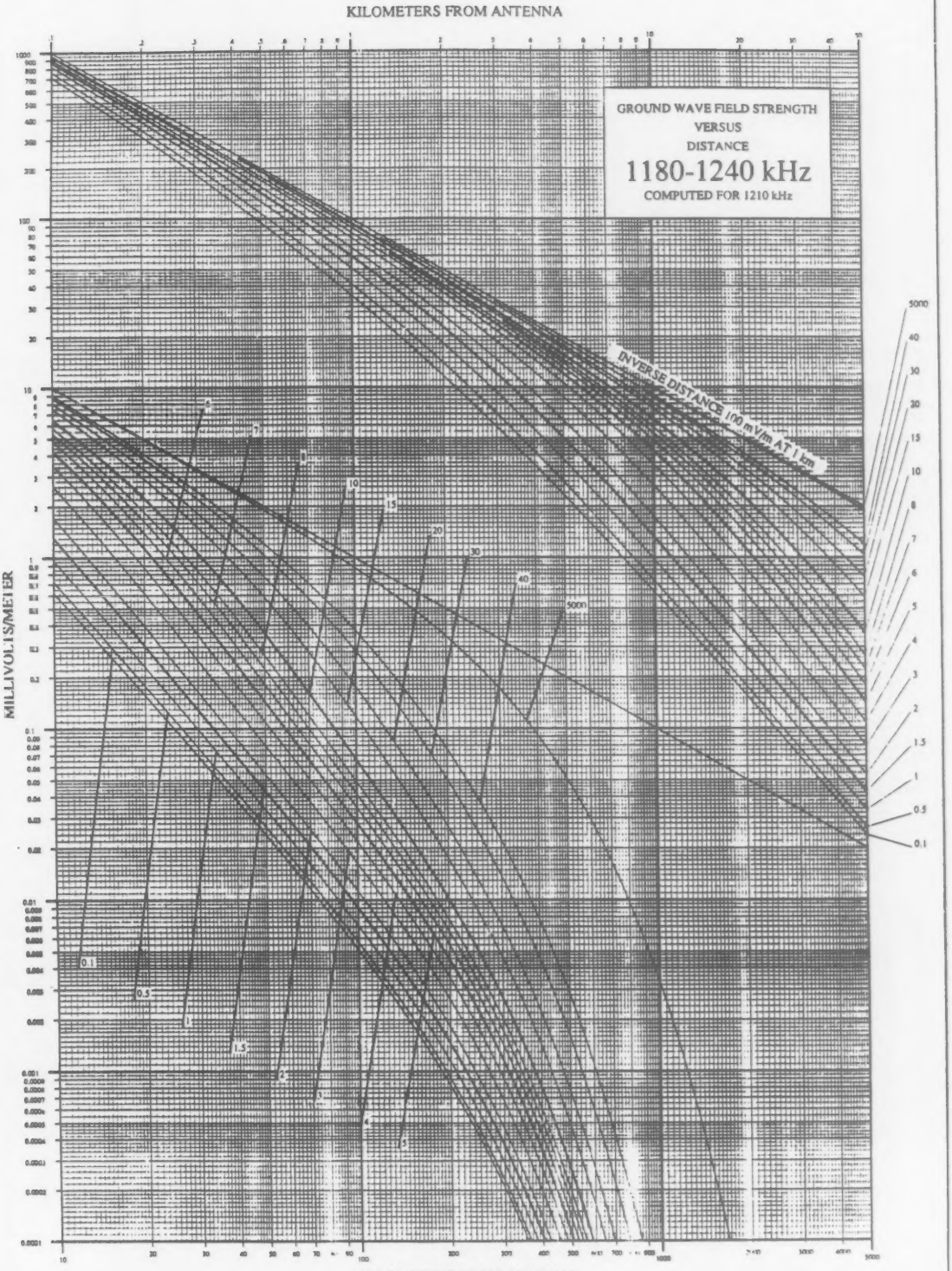
KILOMETERS FROM ANTENNA
GRAPH 13

KILOMETERS FROM ANTENNA



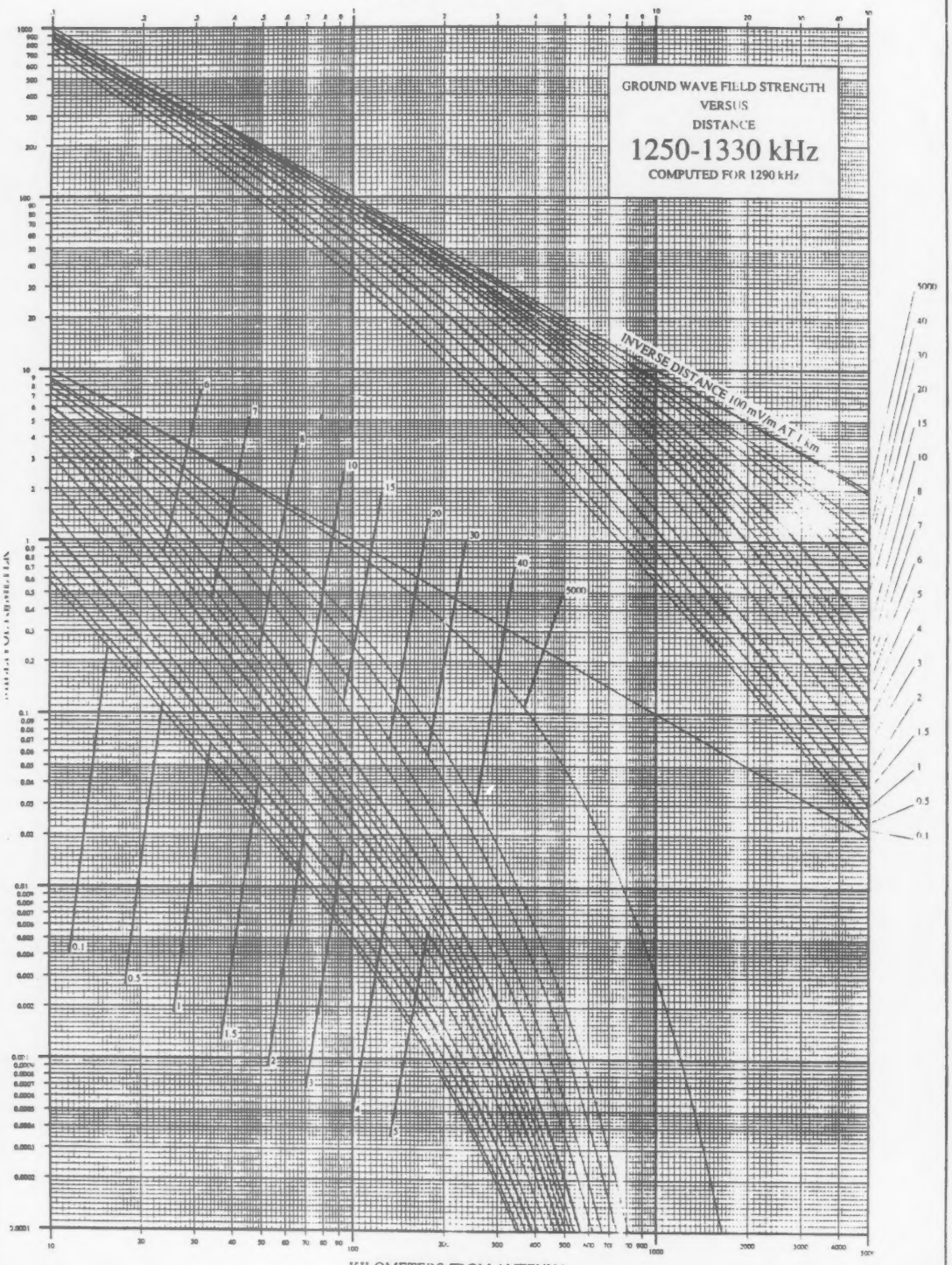
KILOMETERS FROM ANTENNA

GRAPH 14


KILOMETERS FROM ANTENNA
GROUND WAVE FIELD STRENGTH
VERSUS
DISTANCE
1180-1240 kHz
COMPUTED FOR 1210 kHz
INVERSE DISTANCE 100 mV/m AT 1 km
MILLIVOLTS/METER
KILOMETERS FROM ANTENNA

GRAPH 15

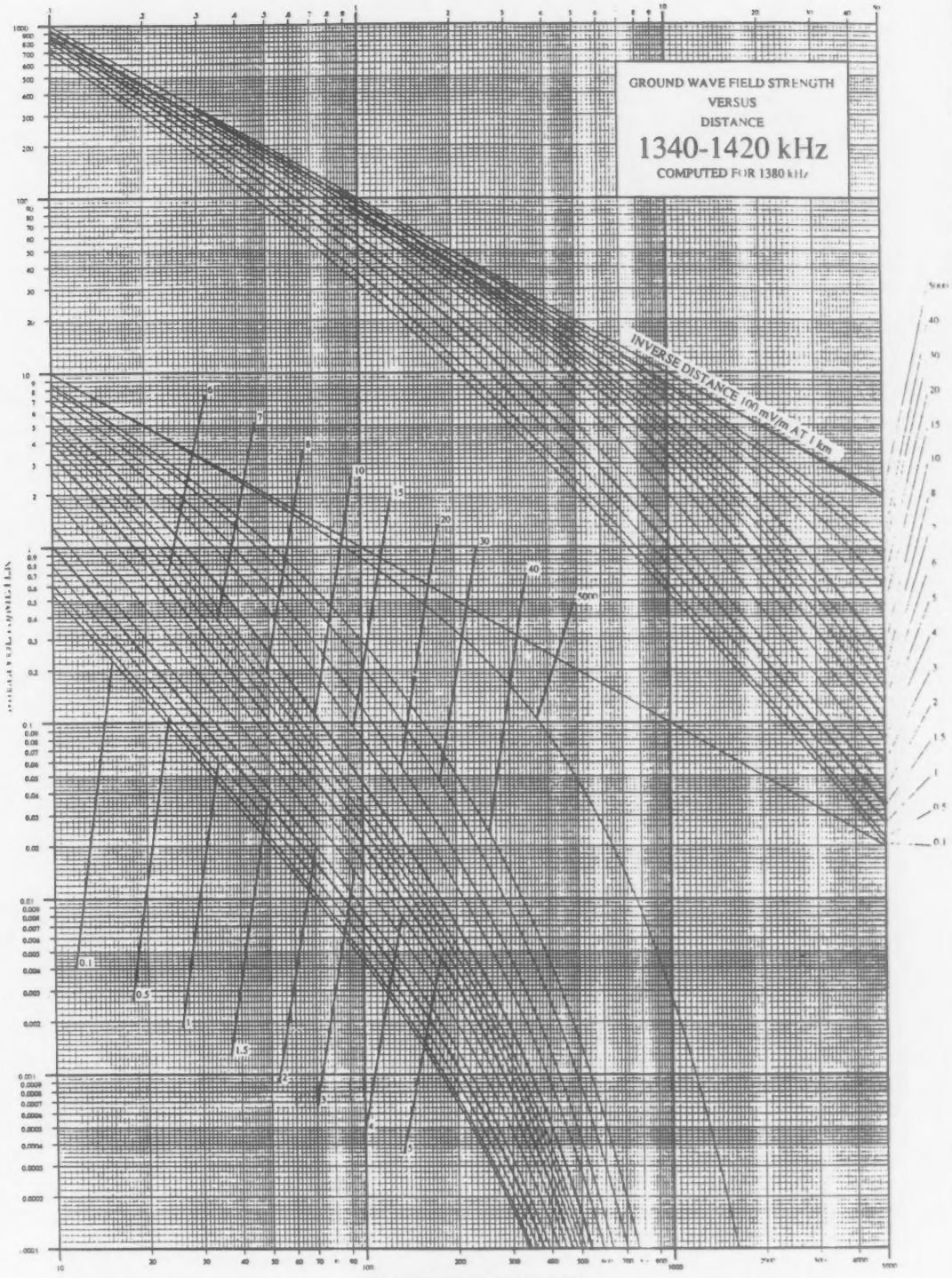
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

GRAPH 16

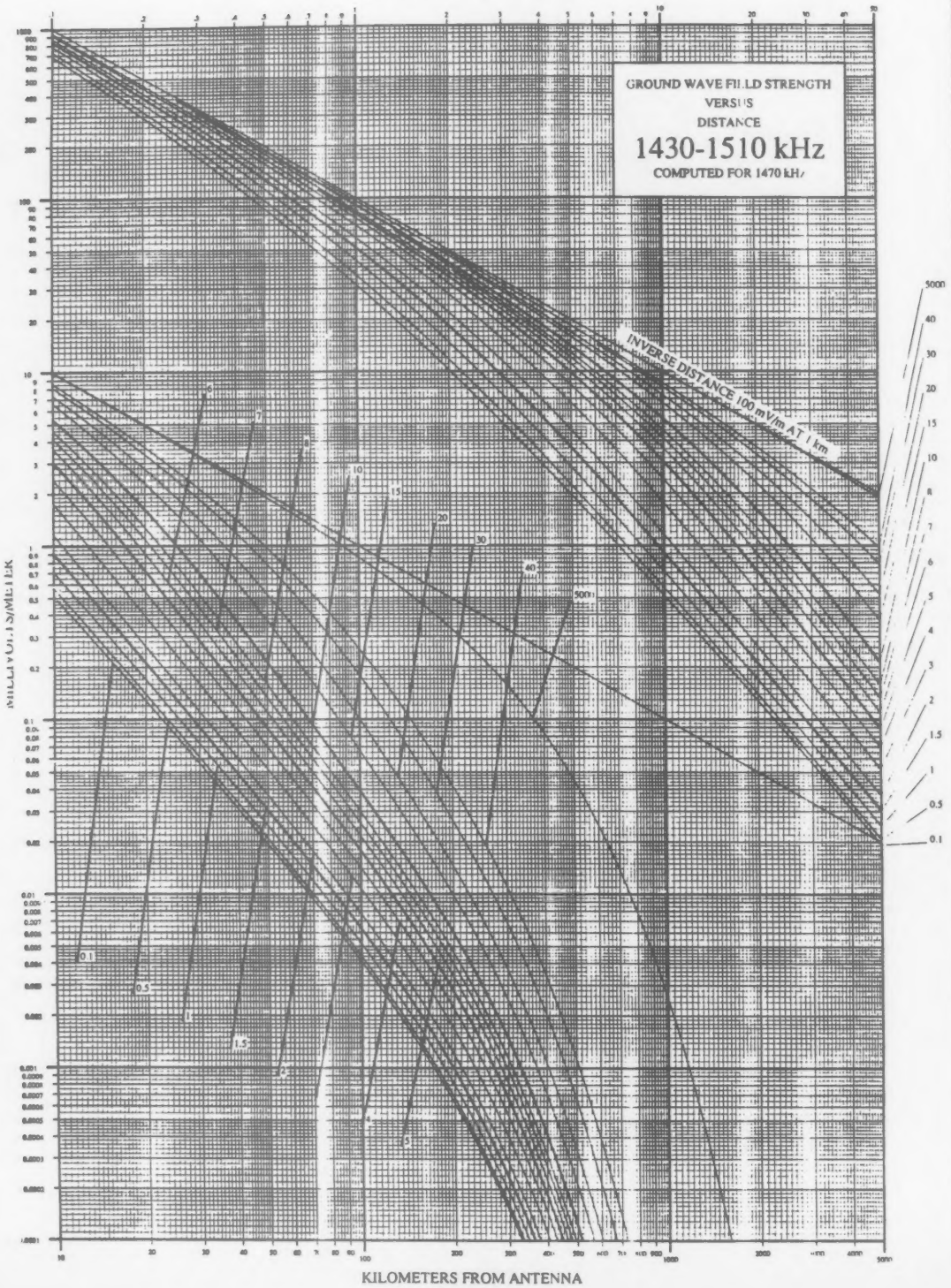
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

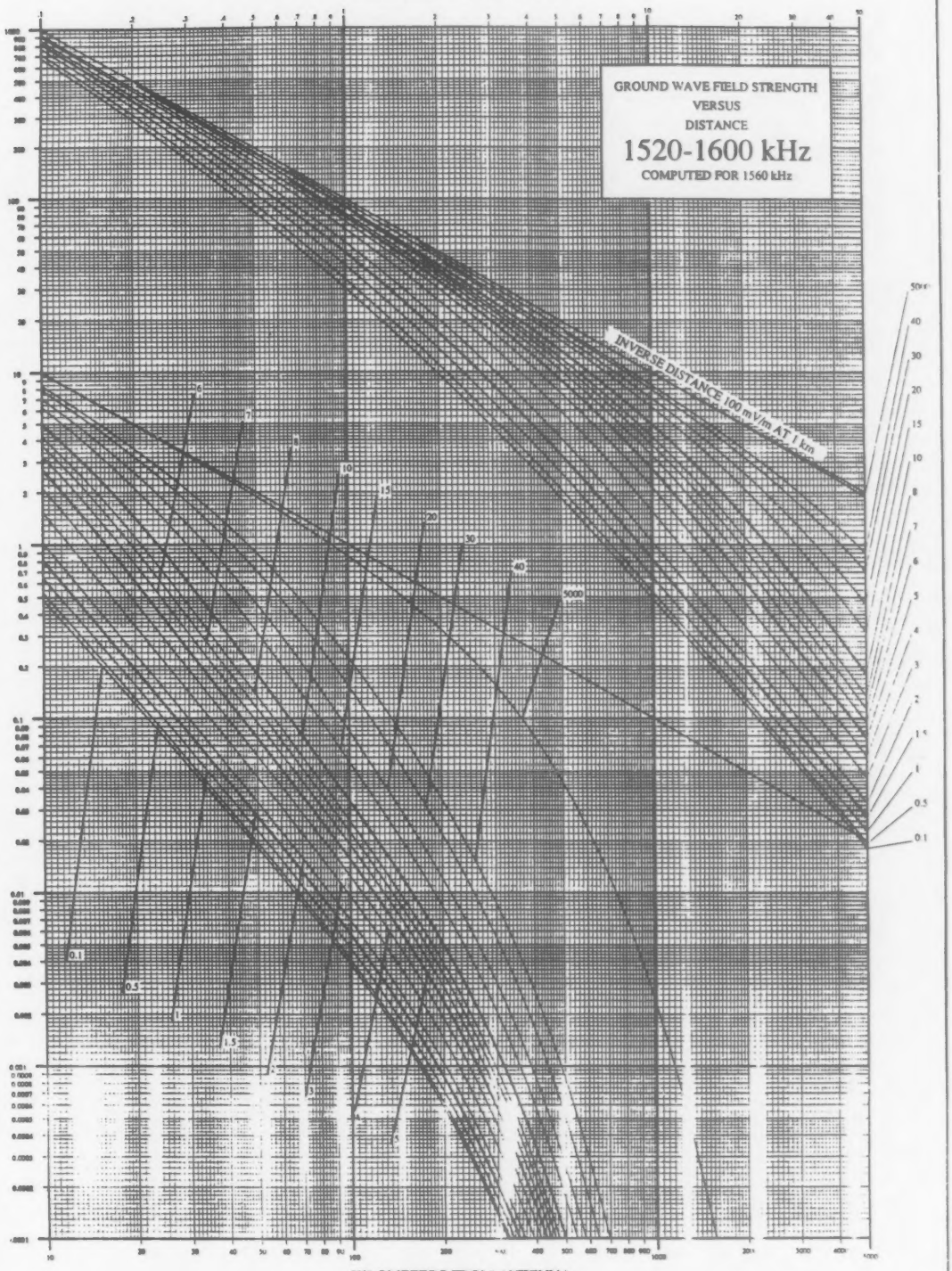
GRAPH 17

KILOMETERS FROM ANTENNA



GRAPH 18

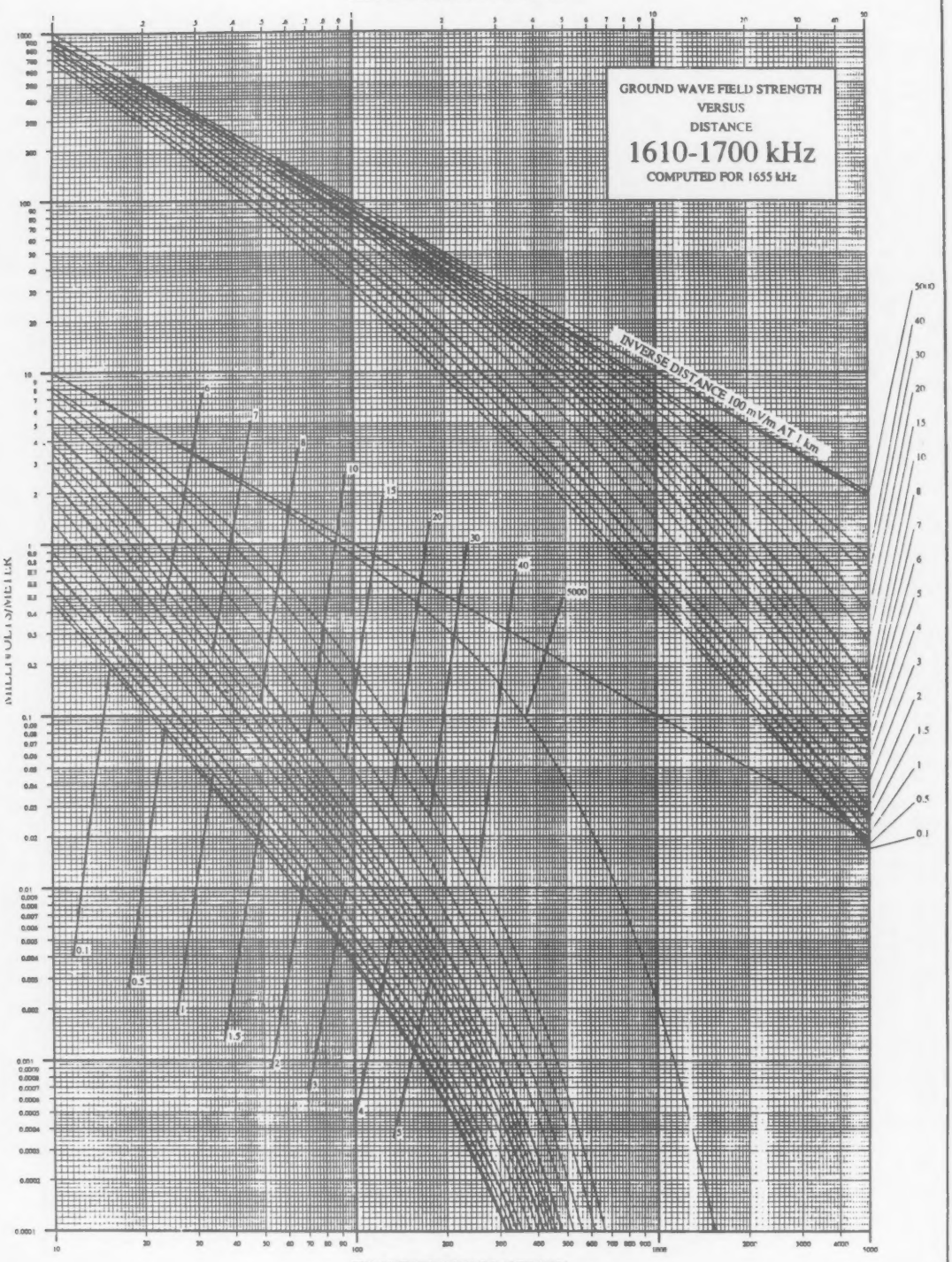
KILOMETERS FROM ANTENNA



KILOMETERS FROM ANTENNA

GRAPH 19

KILOMETERS FROM ANTENNA



GRAPH 20

30. Section 73.185 is amended by adding paragraph (c) to paragraph (b) and revising the new paragraph (b), by revising and redesignating paragraphs (d) and (e) as (c) and (d), by removing paragraphs (i) and (j), and revising and redesignating paragraphs (h) and (k) as (e) and (f), and by revising new paragraph (f)(2) to read as follows:

§73.185 Computation of interfering signal.

(a) * * *

(b) For skywave signals from stations operating on all channels, interference shall be determined from the appropriate formulas and Figure 6a contained in §73.190.

(c) The formulas in §73.190(d) depicted in Figure 6a of §73.190, entitled "Angles of Departure versus Transmission Range" are to be used in determining the angles in the vertical pattern of the antenna of an interfering station to be considered as pertinent to transmission by one reflection. To provide for variation in the pertinent vertical angle due to variations of ionosphere height and ionosphere scattering, the curves 2 and 3 indicate the upper and lower angles within which the radiated field is to be considered. The maximum value of field strength occurring between these angles shall be used to determine the multiplying factor to apply to the 10 percent skywave field intensity value determined from Formula 2 in §73.190. The multiplying factor is found by dividing the maximum radiation between the pertinent angles by 100 mV/m.

(d) Example of the use of skywave curves and formulas: Assume a proposed new Class B station from which interference may be expected is located at a distance of 724 kilometers from a licensed Class B station. The proposed station specifies geographic coordinates of 40° 00′ 00″ N and 100° 00′ 00″ W and the station to be protected is located at an azimuth of 45° true at geographic coordinates of 44 26' 05" N and 93 32' 54" W. The critical angles of radiation as determined from Figure 6a of §73.190 for use with Class B stations are 9.6° and 16.3°. If the vertical pattern of the antenna of the proposed station in the direction of the existing station is such that, between the angles of 9.6° and 16.3° above the horizon the maximum radiation is 260 mV/m at one kilometer, the value of the 50% field, as derived from Formula 1 of §73.190, is 0.06217 mV/m at the location of the existing station. To obtain the value of the 10% field, the 50% value must be adjusted by a factor derived from Formula 2 of §73.190. The value in this case is 8.42 dB. Thus, the 10% field is 0.1616 mV/m. Using this in conjunction with the co-channel protection ratio of 26 dB, the resultant nighttime limit from the proposed station to the licensed station is 3.232 mV/m.

(e) In the case of an antenna which is non-directional in the horizontal plane, the vertical distribution of the relative fields should be computed pursuant to §73.160. In the case of an antenna which is directional in the horizontal plane, the vertical pattern in the great circle direction toward the point of reception in question must first be calculated. In cases where the radiation in the vertical plane, at the pertinent azimuth, contains a large lobe at a higher angle than the pertinent angle for one reflection, the method of calculating interference will not be restricted to that just described; each such case will be considered on the basis of the best

knowledge available.

(f) In performing calculations to determine permissible radiation from stations operating presunrise or postsunset in accordance with §73.99, calculated diurnal factors will be multiplied by the values of skywave field strength for such stations obtained from Formula 1 or 2 of §73.190.

(1) * * *

(2) Constants used in calculating diurnal factors for the presunrise and postsunset periods are contained in paragraphs (f)(2)(i) and (ii) respectively. The columns labeled T_{mp} represent the number of hours before and after sunrise and sunset at the path midpoint.

* * * * *

31. Section 73.187 is amended by revising paragraphs (a)(1) and (2), (a)(2)(i), (a)(2)(ii), (a)(3), (a)(3)(i), (a)(3)(ii), and (b) to read as follows:

§73.187 Limitation on daytime radiation.

(a)(1) Except as otherwise provided in paragraphs (a)(2) and (3) of this section, no authorization will be granted for a Class B or Class D station on a frequency specified in §73.25 if the proposed operation would radiate during the period of critical hours (the two hours after local sunrise and the two hours before local sunset) toward any point on the 0.1 mV/m contour of a co-channel U.S. Class A station, at or below the pertinent vertical angle determined from Curve 2 of Figure 6a of §73.190, values in excess of those obtained as provided in paragraph (b) of this section.

(2) The limitation set forth in paragraph (a)(1) of this section shall not apply in the following cases:

(i) Any Class B or Class D operation authorized before November 30, 1959; or

(ii) For Class B and Class D stations authorized before November 30, 1959, subsequent changes of facilities which do not involve a change in frequency, an increase in radiation toward any point on the 0.1 mV/m contour of a co-channel U.S. Class A station, or the move of transmitter site materially closer to the 0.1 mV/m contour of such Class A station.

(3) A Class B or Class D station authorized before November 30, 1959, and subsequently authorized to increase daytime radiation in any direction toward the 0.1 mV/m contour of a co-channel U.S. Class A station (without a change in frequency or a move of transmitter site materially closer to such contour), may not, during the two hours after local sunrise or the two hours before local sunset, radiate in such directions a value exceeding the higher of:

(i) The value radiated in such directions with facilities last authorized before November 30, 1959, or

(ii) The limitation specified in paragraph (a)(1) of this section.

(b) To obtain the maximum permissible radiation for a Class B or Class D station on a given frequency from 640 through 990 kHz, multiply the radiation value obtained for the given distance and azimuth from the 500 kHz chart (Figure 9 of §73.190) by the appropriate interpolation factor shown in the K_{500} column of paragraph (c) of this section; and multiply the radiation value obtained for the given distance and azimuth from the 1000 kHz chart (Figure 10 of §73.190) by the appropriate interpolation factor shown in the K_{1000} column of paragraph (c) of this section. Add the two products thus obtained; the result is the maximum radiation value applicable to the Class B or Class D station in the pertinent directions. For frequencies from 1010 to 1580 kHz, obtain in a similar manner the proper radiation values from the 1000 and 1600 kHz charts (Figures 10 and 11 of §73.190), multiply each of these values by the appropriate interpolation factors in the K'_{1000} and K'_{1600} columns in paragraph (c) of this section, and add the products.

* * * * *

32. Section 73.189 is amended by revising paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iii), (b)(3), and (b)(6), to read as follows:

§73.189 Minimum antenna heights or field strength requirements.

* * * * *

(b) * * *

(2) * * *

(i) Class C stations, and stations in Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands on 1230, 1240, 1340, 1400, 1450 and 1490 kHz that were formerly Class C and were redesignated as Class B pursuant to §73.26(b), 45 meters or a minimum effective field strength of 241 mV/m for 1 kW (121 mV/m for 0.25 kW). (This height applies to a Class C station on a local channel only. Curve A shall apply to any Class C stations in the 48 conterminous States that are assigned to Regional channels.)

(ii) Class A (Alaska), Class B and Class D stations other than those covered in §73.189(b)(2)(i), a minimum effective field strength of 282 mV/m for 1 kW.

(iii) Class A stations, a minimum effective field strength of 362 mV/m for 1 kW.

(3) The heights given on the graph for the antenna apply regardless of whether the antenna is located on the ground or on a building. Except for the reduction of shadows, locating the

antenna on a building does not necessarily increase the efficiency and where the height of the building is in the order of a quarter wave the efficiency may be materially reduced.

* * * * *

(6) The main element or elements of a directional antenna system shall meet the above minimum requirements with respect to height or effective field strength. No directional antenna system will be approved which is so designed that the effective field of the array is less than the minimum prescribed for the class of station concerned, or in case of a Class A station less than 90 percent of the ground wave field which would be obtained from a perfect antenna of the height specified by Figure 7 of §73.190 for operation on frequencies below 1000 kHz, and in the case of a Class B or Class D station less than 90 percent of the ground wave field which would be obtained from a perfect antenna of the height specified by Figure 7 of §73.190 for operation on frequencies below 750 kHz.

33. Section 73.190 is amended by revising paragraphs (a), (b), (c), and (e) to read as follows:

§73.190 Engineering charts and related formulas.

(a) This section consists of the following Figures: 2, r3, 5, 6a, 7, 8, 9, 10, 11, 12, and 13. Additionally, formulas that are directly related to graphs are included.

(b) Formula 1 is used for calculation of 50% skywave field strength values.

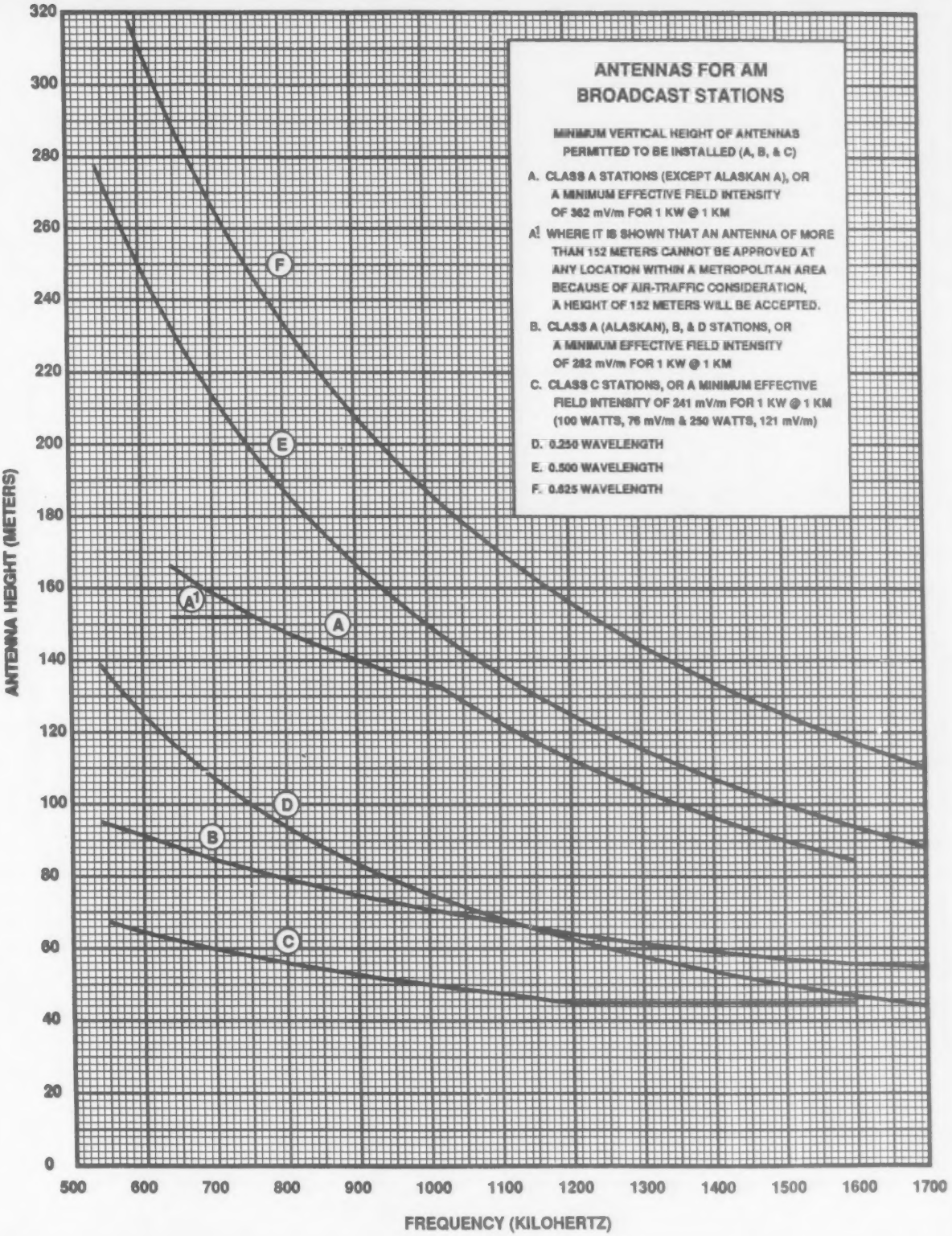

ANTENNAS FOR AM
BROADCAST STATIONS
MINIMUM VERTICAL HEIGHT OF ANTENNAS
PERMITTED TO BE INSTALLED (A, B, & C)
A. CLASS A STATIONS (EXCEPT ALASKAN A), OR
A MINIMUM EFFECTIVE FIELD INTENSITY
OF 362 mV/m FOR 1 KW @ 1 KM
A1 WHERE IT IS SHOWN THAT AN ANTENNA OF MORE
THAN 152 METERS CANNOT BE APPROVED AT
ANY LOCATION WITHIN A METROPOLITAN AREA
BECAUSE OF AIR-TRAFFIC CONSIDERATION,
A HEIGHT OF 152 METERS WILL BE ACCEPTED.
B. CLASS A (ALASKAN), B, & D STATIONS, OR
A MINIMUM EFFECTIVE FIELD INTENSITY
OF 282 mV/m FOR 1 KW @ 1 KM
C. CLASS C STATIONS, OR A MINIMUM EFFECTIVE
FIELD INTENSITY OF 241 mV/m FOR 1 KW @ 1 KM
(100 WATTS, 76 mV/m & 250 WATTS, 121 mV/m)
D. 0.250 WAVELENGTH
E. 0.500 WAVELENGTH
F. 0.625 WAVELENGTH
ANTENNA HEIGHT (METERS)
320
300
280
260
240
220
200
180
160
140
120
100
80
60
40
20
0
F
E
A1
A
D
B
C
500
600
700
800
900
1000
1100
1200
1300
1400
1500
1600
1700
FREQUENCY (KILOHERTZ)

Figure 7

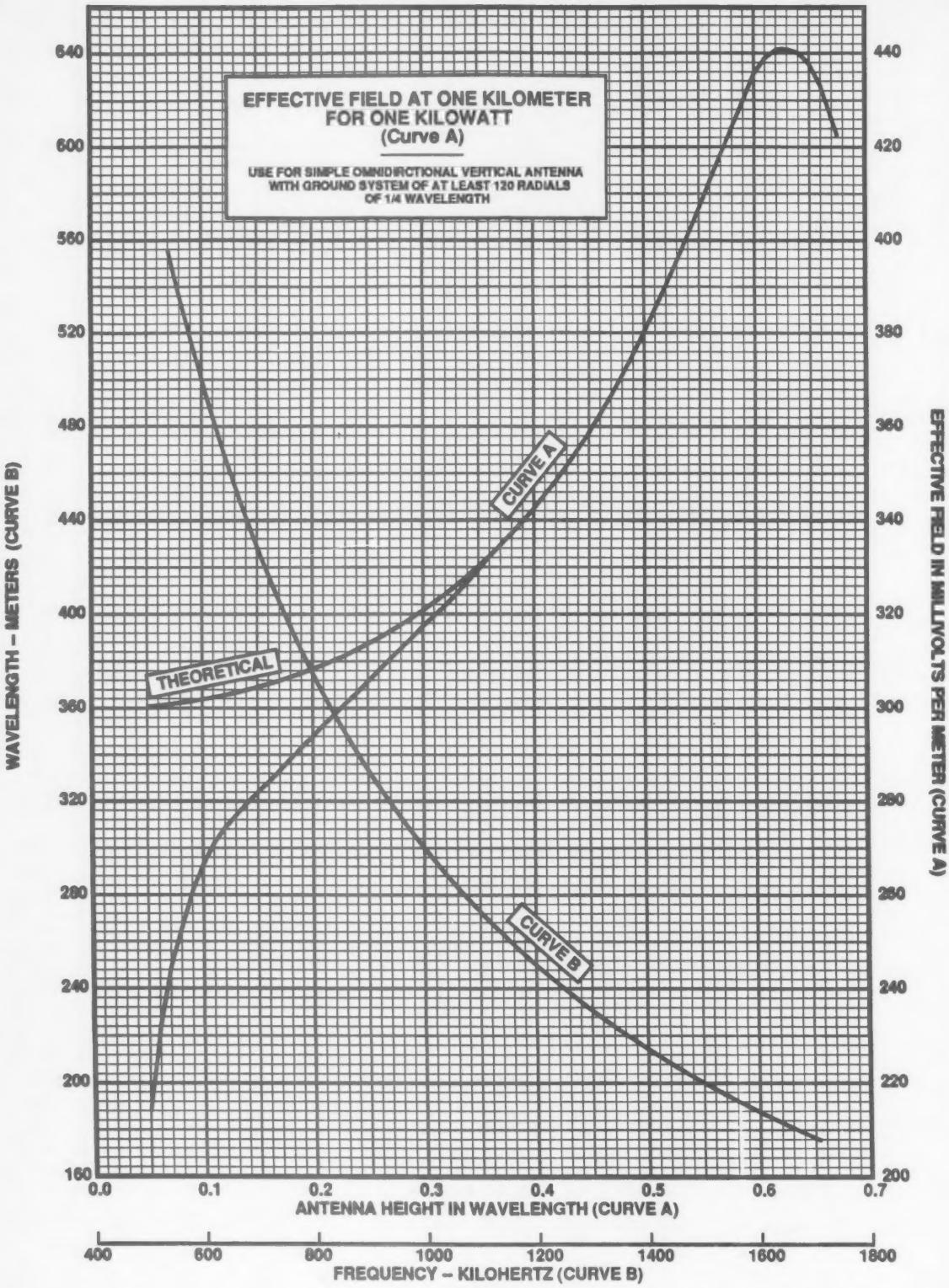


Figure 8

6453

Formula 1. Skywave field strength, 50% of the time (at SS+6):

The skywave field strength, $F_c(50)$, for a characteristic field strength of 100 mV/m at 1 km; is given by:

$$F_c(50) = (97.5 - 20\log D) - (2\pi + 4.95\tan^2\phi_M)\sqrt{\left(\frac{D}{1000}\right)} \quad dB(\mu V/m) \qquad \text{(Eq. 1)}$$

The slant distance, D, is given by:

$$D = \sqrt{40{,}000 + d^2} \quad km \qquad \text{(Eq. 2)}$$

The geomagnetic latitude of the midpoint of the path, ϕ_M, is given by:

$$\phi_M = \arcsin[\sin a_M \sin 78.5° + \cos a_M \cos 78.5° \cos(69 + b_M)] \quad degrees \qquad \text{(Eq. 3)}$$

The short great-circle path distance, d, is given by:

$$d = 111.18 d° \quad km \qquad \text{(Eq. 4)}$$

Where:

$$d° = \arccos[\sin a_T \sin a_R + \cos a_T \cos a_R \cos(b_R - b_T)] \quad degrees \qquad \text{(Eq. 5)}$$

Where:

a_T is the geographic latitude of the transmitting terminal (degrees)
a_R is the geographic latitude of the receiving terminal (degrees)
b_T is the geographic longitude of the transmitting terminal (degrees)
b_R is the geographic longitude of the receiving terminal (degrees)
a_M is the geographic latitude of the midpoint of the great-circle path (degrees) and is given by:

$$a_M = 90 - \arccos\left[\sin a_R \cos\left(\frac{d°}{2}\right) + \cos a_R \sin\left(\frac{d°}{2}\right)\left(\frac{\sin a_T - \sin a_R \cos d°}{\cos a_R \sin d°}\right)\right] \qquad \text{(Eq. 6)}$$

b_M is the geographic longitude of the midpoint of the great-circle path (degrees) and is given by:

$$b_M = b_R + k\left[\arccos\left(\frac{\cos\left(\frac{d°}{2}\right) - \sin a_R \sin a_M}{\cos a_R \cos a_M}\right)\right] \qquad \text{(Eq. 7)}$$

Note (1): If $|\phi_M|$ is greater than 60 degrees, equation (1) is evaluated for $|\phi_M| = 60$ degrees.
Note (2): North and east are considered positive; south and west negative.
Note (3): In equation (7), $k = -1$ if $b_R > b_T$, otherwise $k = 1$.

(c) Formula 2 is used for calculation of 10% skywave field strength values.

Formula 2. Skywave field strength, 10% of the time (at SS+6):

The skywave field strength, $F_c(10)$, is given by:

$$F_c(10) = F_c(50) + \Delta \qquad dB(\mu V/m)$$

Where: $\Delta = 6$ when $|\phi_M| < 40$
$\Delta = 0.2\ |\phi_M| - 2$ when $40 \leq |\phi_M| \leq 60$
$\Delta = 10$ when $|\phi_M| > 60$

* * * * *

(e) In the event of disagreement between computed values using the formulas shown above and values obtained directly from the figures, the computed values will control.

34. Section 73.1030 is amended by revising the table in paragraph (b) to read as follows:

§73.1030 Notifications concerning interference to radio astronomy, research and receiving installations.

* * * * *

(b) * * *

Frequency range	Field Strength in Authorized Bandwidth of Service (mV/m)	Power Flux Density in Authorized Bandwidth of Service (dBW/m^2) 1/
Below 540 kHz	10	-65.8
540 to 1700 kHz	20	-59.8
1.7 to 470 MHz	10	-65.8 2/
470 to 890 MHz	30	-56.2 2/
Above 890 MHz	1	-85.8 2/

1/ Equivalent values of power flux density are calculated assuming free space characteristic impedance of 376.7 = 120 ohms.

2/ Space stations shall conform to the power flux density limits at the earth's surface specified in appropriate parts of the FCC rules, but in no case should exceed the above levels in any 4 kHz band for all angles of arrival.

* * * * *

35. Section 73.1125 is amended by adding a note to read as follows:

§73.1125 Station main studio location.

* * * * *

Note: AM stations that simulcast on a frequency in the 535-1605 kHz band and on a frequency in the 1605-1705 kHz band need only have the studio be located within the 5 mV/m contour of the lower band operation during the term of the simultaneous operating authority. Upon termination of the 535-1605 kHz band portion of the dual frequency operation, the above rule shall then become applicable to the remaining operation in the 1605-1705 kHz band.

36. A new paragraph (c) is added to Section 73.1150 to read as follows:

§73.1150 Transferring a station.

* * * * *

(c) Licensees and/or permittees authorized to operate in the 535-1605 kHz and in the 1605-1705 kHz band pursuant to the Report and Order in MM Docket No. 87-267 will not be permitted to assign or transfer control of the license or permit for a single frequency during the period that joint operation is authorized.

37. Section 73.1201 is amended by revising paragraph (c)(2) to read as follows:

§73.1201 Station identification.

* * * * *

(c) * * *

(2) Simultaneous AM (535-1605 kHz) and AM (1605-1705 kHz) broadcasts. If the same licensee operates an AM broadcast station in the 535-1605 kHz band and an AM broadcast station in the 1605-1705 kHz band with both stations licensed to the same community and simultaneously broadcasts the same programs over the facilities of both such stations, station identification announcements may be made jointly for both stations for periods of such simultaneous operation.

* * * * *

38. Paragraph (b)(1)ii) of Section 73.1570 is revised to read as follows:

§73.1570 Modulation levels: AM, FM, and TV aural.

* * * * *

(b) * * *

(1) * * *

(ii) For AM stations transmitting telemetry signals for remote control or automatic transmission system operation, the amplitude of modulation of the carrier by the use of subaudible tones must not be higher than necessary to effect reliable and accurate data transmission and may not, in any case, exceed 6%.

* * * * *

39. Section 73.1650 is amended by revising paragraph (b)(2) and adding paragraphs (b)(2)(i) and (b)(2)(ii) to read as follows:

§73.1650 International broadcasting agreements.

* * * * *

(b) * * *

(2) Regional Agreements for the Broadcasting Service in Region 2:

(i) MF Broadcasting 535-1605 kHz, Rio de Janeiro, 1981.

(ii) MF Broadcasting 1605-1705 kHz, Rio de Janeiro, 1988.

* * * * *

40. A note is added at the end of Section 73.1665 to read as follows:

§73.1665 Main transmitters.

* * * * *

Note: Pending the availability of AM broadcast transmitters that are type-accepted for use in the 1605-1705 kHz band, transmitters that are type-accepted for use in the 535-1605 kHz band as shown on the FCC's *Radio Equipment List* may be utilized in the 1605-1705 kHz band if it is shown that the requirements of §73.44 have been met. FCC approval of the manufacturer's application for type-acceptance will supersede the applicability of this note.

41. Paragraph (c) in Section 73.1705 is revised to read as follows:

§73.1705 Time of operation.

* * * * *

(c) AM stations in the 535-1705 kHz band will be licensed for unlimited time. In the 535-1605 kHz band, stations that apply for share time and specified hours operations may also be licensed. AM stations licensed to operate daytime-only and limited-time may continue to do so; however, no new such stations will be authorized, except for fulltime stations that reduce operating hours to daytime-only for interference reduction purposes.

42. Section 73.1725 is revised to read as follows:

§73.1725 Limited time.

(a) Operation is applicable only to Class B (secondary) AM stations on a clear channel with facilities authorized before November 30, 1959. Operation of the secondary station is permitted during daytime and until local sunset if located west of the Class A station on the channel, or until local sunset at the Class A station if located east of that station. Operation is also permitted during nighttime hours not used by the Class A station or other stations on the channel.

(b) No authorization will be granted for:

(1) A new limited time station;

(2) A limited time station operating on a changed frequency;

(3) A limited time station with a new transmitter site materially closer to the 0.1 mV/m contour of a co-channel U.S. Class A station; or

(4) Modification of the operating facilities of a limited time station resulting in increased radiation toward any point on the 0.1 mV/m contour of a co-channel U.S. Class A station during the hours after local sunset in which the limited time station is permitted to operate by reason of location east of the Class A station.

(c) The licensee of a secondary station which is authorized to operate limited time and which may resume operation at the time the Class A station (or stations) on the same channel ceases operation shall, with each application for renewal of license, file in triplicate a copy of its regular operating schedule. It shall bear a signed notation by the licensee of the Class A station of its objection or lack of objection thereto. Upon approval of such operating schedule, the FCC will affix its file mark and return one copy to the licensee authorized to operate limited time. This shall be posted with the station license and considered as a part thereof. Departure from said operating schedule will be permitted only pursuant to §73.1715 (Share time).

43. Section 73.1740 is amended by revising paragraph (a)(1)(i) to read as follows:

§73.1740 Minimum operating schedule.

(a) * * *

(1) * * *

(i) Class D stations which have been authorized nighttime operations need comply only with the minimum requirements for operation between 6 a.m. and 6 p.m., local time.

* * * * *

44. Paragraph (a) of Section 73.3516 is revised to read as follows:

§73.3516 Specification of Facilities

(a) An application for facilities in the AM, FM, or TV broadcast services or low power TV service shall be limited to one frequency, or channel, and no application will be accepted for filing if it requests an alternate frequency or channel. Applications specifying split frequency AM operations using one frequency during daytime hours complemented by a different frequency during nighttime hours will not be accepted for filing.

* * * * *

45. New paragraphs (c) and (d) and Notes 1 and 2 are added to Section 73.3517 to read as follows:

§73.3517 Contingent applications.

* * * * *

(c) Upon payment of the filing fees prescribed in §1.1111 of this chapter, the Commission will accept two or more applications filed by existing AM licensees for modification of facilities that are contingent upon granting of both, if granting such contingent applications will reduce interference to one or more AM stations or will otherwise increase the area of interference-free service. The applications must state that they are filed pursuant to an interference reduction arrangement and must cross-reference all other contingent applications.

(d) Modified proposals curing conflicts between mutually exclusive clusters of applications filed in accordance with section (c) will be accepted for 60 days following issuance of a public notice identifying such conflicts.

Note 1: No application to move to a frequency in the 1605-1705 kHz band may be part of any

package of contingent applications associated with a voluntary agreement.

Note 2: In cases where no modified proposal is filed pursuant to section (d), the Commission will grant the application resulting in the greatest net interference reduction.

46. Paragraph (i) in Section 73.3550 is revised to read as follows:

§73.3550 Requests for new or modified call sign assignments.

* * * * *

(i) Stations in different broadcast services (or operating jointly in the 535-1605 kHz band and in the 1605-1705 kHz band) which are under common control may request that their call signs be conformed by the assignment of the same basic call sign if that call sign is not being used by a non-commonly owned station. For the purposes of this paragraph, 50% or greater common ownership shall constitute a prima facie showing of common control.

* * * * *

47. Section 73.3555 is amended by revising Note 4 and adding new Notes 8 and 9 and 10 to read as follows:

§73.3555 Multiple ownership.

* * * * *

Note 4: Paragraphs (a) through (d) of this section will not be applied to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class C stations, to applications for assignment of license or transfer of control filed in accordance with §73.3540(f) or §73.3541(b) of this part, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated, or controlled broadcast stations in the same service and if no new encompassment of communities proscribed in paragraphs (b) and (c) of this section as to commonly owned, operated, or controlled broadcast stations or daily newspapers would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other no greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by this section may not be

assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated, or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

* * * * *

Note 8: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 535-1605 kHz band where grant of such application will result in the overlap of 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled if the applicant shows that a significant reduction in interference to adjacent or co-channel stations would accompany such common ownership. Such AM overlap cases will be considered on a case-by-case basis to determine whether common ownership, operation or control of the stations in question would be in the public interest. Applicants in such cases must submit a contingent application for the major or minor facilities change needed to achieve the interference reduction along with the application which seeks to create the 5 mV/m overlap situation.

Note 9: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band where grant of such application will result in the overlap of the 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled. Paragraphs (d)(1)(i) and (d)(1)(ii) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band by an entity that owns, operates, controls or has a cognizable interest in AM radio stations in the 535-1605 kHz band.

Note 10: Authority for joint ownership granted pursuant to Note 9 will expire at 3:00 a.m. local time on the fifth anniversary of the date of issuance of a construction permit for an AM radio station in the 1605-1705 kHz band.

48. Section 73.3564 is amended by adding a new paragraph (e) to read as follows:

§73.3564 Acceptance of applications.

* * * * *

(e) Applications for operation in the 1605-1705 kHz band will be accepted only if filed pursuant to the terms of §73.30(b).

49. Section 73.3570 is redesignated as Section 73.23.

50. Section 73.3571 is amended by revising paragraphs (a), and (a)(1), by adding a new paragraph (a)(3), by removing paragraphs (d)(1), (d)(4), and (e), by revis ng and redesignating

paragraphs (d)(2) and (d)(3) as (d)(1) and (d)(2), by redesignating paragraphs (f) through (i) as (e) through (h) and revising new paragraphs (f) and (h), by redesignating paragraphs (j)(1), (j)(2), (j)(3), and (j)(4) as (i)(1), (i)(2), (i)(3), and (i)(4) and revising the text of new paragraph (i)(1), and by redesignating paragraphs (k) and (l) as paragraphs (j) and (k) to read as follows:

§73.3571 Processing of AM broadcast station applications.

(a) Applications for AM broadcast facilities are divided into three groups.

(1) In the first group are applications for new stations or for major changes in the facilities of authorized stations. A major change is any increase in power except where accompanied by a complementary reduction of antenna efficiency which leads to the same amount, or less, radiation in all directions (in the horizontal and vertical planes when skywave propagation is involved, and in the horizontal plane only for daytime considerations), relative to the presently authorized radiation levels, or any change in frequency, hours of operation, or community of license. However, the FCC may, within 15 days after the acceptance for filing of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of §§73.3580 and 1.1111 pertaining to major changes.

(2) * * *

(3) The third group consists of applications for operation in the 1605-1705 kHz band which are filed subsequent to Commission notification that allotments have been awarded to petitioners under the procedure specified in §73.30.

* * * * *

(d) Applications proposing to increase the power of an AM station are subject to the following requirements:

(1) In order to be acceptable for filing, any application which does not involve a change in site must propose at least a 20% increase in the station's nominal power.

(2) Applications involving a change in site are not subject to the requirements in paragraph (d)(1) of this section.

(3) * * *

(4) Applications for nighttime power increases for Class D stations are not subject to the requirements of this section and will be processed as minor changes.

* * * * *

(f) Applications for change of license to change hours of operation of a Class C station, to decrease hours of operation of any other class of station, or to change station location involving no change in transmitter site will be considered without reference to the processing line.

* * * * *

(h) When an application which has been designated for hearing has been removed from the hearing docket, the application will be returned to its proper position (as determined by the file number) in the processing line. Whether or not a new file number will be assigned will be determined pursuant to paragraph (i) of this section, after the application has been removed from the hearing docket.

(i)(1) A new file number will be assigned to an application for a new station, or for major changes in the facilities of an authorized station, when it is amended to change frequency, to increase power, to increase hours of operation, or to change station location. Any other amendment modifying the engineering proposal, except an amendment regarding the type of equipment specified, will also result in the assignment of a new file number unless such amendment is accompanied by a complete engineering study showing that the amendment would not involve new or increased interference problems with existing stations or other applications pending at the time the amendment is filed. If, after submission and acceptance of such an engineering amendment, subsequent examination indicates new or increased interference problems with either existing stations or other applications pending at the time the amendment was received at the FCC, the application will then be assigned a new file number and placed in the processing line according to the numerical sequence of the new file number.

* * * * *

51. New paragraph (c) is added to Section 73.3598 to read as follows:

§73.3598 Period of construction.

* * * * *

(c) An existing AM station operating in the 535-1605 kHz band that receives a conditional permit to operate in the 1605-1705 kHz band; such permit shall specify a period of not more than 18 months from the date of issuance of the original construction permit within which construction shall be completed and application for license filed.

52. Section 73.4160 is removed.

53. Section 73.4255 is revised to read as follows:

§73.4255 Tax certificates: Issuance of.

(a) See Public Notice, FCC 76-337, dated April 21, 1976. 59 FCC 2d, 91; 41 FR 17605, April 27, 1976.

(b) See Report and Order MM Docket 87-267, FCC 91-303 adopted, September 26, 1991.

Part 90 of Title 47 of the CFR is amended as follows:

54. The authority citiation for Part 90 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

55. Section 90.17(b) is amended by adding 540 through 1700 kHz (1610 kHz had been previously assigned) to the Table of Frequencies as follows:

§90.17 Local Government Radio Service

(a) * * * * *

(b) Frequencies available.

* * * * *

Local Government Radio Service Frequency Table		
Frequency or Band (kHz)	Class of Station(s)	Limitations
530 540-1700 2726	Base (T.I.S.) do Base or Mobile	23 23 1

* * * * *

56. Section 90.242 is amended by revising the first sentence of (a), the first sentence of (a)(2)(i), and (a)(2)(ii) to read as follows:

§90.242 Travelers Information Stations.

(a) The frequencies 530 through 1700 kHz in 10 kHz increments. * * *

* * * * *

(a)(2)(i) A statement certifying that the transmitting site of the Travelers Information Station will be located at least 15 km (9.3 miles) measured orthogonally outside the measured 0.5 mV/m daytime contour (0.1 mV/m for Class A stations) of any AM broadcast station operating on a first adjacent channel or at least 130 km (80.6 miles) outside the measured 0.5 mV/m daytime contour (0.1 mV/m for Class A stations) of any AM broadcast station operating on the same channel, or, if nighttime operation is proposed, outside the theoretical 0.5 mV/m-50% nighttime skywave contour of a U.S. Class A station. * * *

(a)(2)(ii) In consideration of possible cross-modulation and inter-modulation interference effects which may result from the operation of a Travelers Information Station in the vicinity of an AM broadcast station on the second or third adjacent channel, the applicant shall certify that he has considered these possible interference effects and, to the best of his knowledge, does not foresee harmful interference occurring to broadcast stations operating on second or third adjacent channels.

* * * * *

Statement of Commissioner James H. Quello
Report and Order,
Review of the Technical Assignment Criteria for the AM Broadcast Service
September 26, 1991

Today's vote to strengthen the AM broadcasting service comes at a crucial time. With the recent NAB report revealing that more than half of all radio stations are losing money and with AM being the hardest hit, the public interest demands that we take positive action. I hope the initiatives adopted today come soon enough and are far-reaching enough to help reverse current trends.

While I fully support this Report & Order in general, I have some reservations about the tentative conclusion that we should alter our rules regarding AM/FM simulcasting. I concur in the result of the Commission reaching a tentative conclusion only because it means that we have decided to keep the current rules intact. It is true that the Commission will revisit the issue in three years, but today's action creates no presumption that the rules will change when that time comes. Just as with any change in policy, we must have record support for the choice we make. But on the current record, there simply is no basis to conclude — tentatively or otherwise — that the reduction or elimination of simulcasting will help AM radio.

I can agree as an abstract principle that perhaps it would be better if every station generated original programming. In that sense only can I support the tentative conclusion. But we do not live in the abstract and AM radio needs to be assisted more than just "in principle." We need to know far more before we could reasonably conclude that restricting simulcasting will reduce interference or make the band stronger as a whole.

It is noteworthy that the Notice of Proposed Rulemaking did not ask how many AM/FM combinations serve substantially different service areas. Nor did it gather information regarding the extent of program duplication. Without this information, we haven't the slightest notion of the extent to which the proposed reduction of simulcasting would help eliminate AM congestion. On the other hand, there is evidence in the record that broadcasters would be harmed by reimposing restrictions on simulcasting. At this point we can be certain of only one thing: a forced reduction in simulcasting would drive up the programming costs of the affected AM broadcasters at a time when they can least afford it.

I understand the philosophy of the tentative conclusion. It is that you can't make an omelette without breaking a few eggs. But in this case the "eggs" are AM broadcasters who have been operating under the rules that the Commission established. I just think it is irresponsible to start breaking eggs unless we know that we have the other ingredients we need to make the omelette.

With respect to eligibility for the expanded band, I agree with the principle that new entrants should have access. But as with the issue of AM/FM simulcasting, we must take a real world view. Migration to the new frequencies makes economic sense only for those who can transmit programming on an established channel until there is

significant penetration in the market by new receivers capable of tuning in 1605 to 1705 kHz. Allowing new entrants a theoretical spot on the expanded band would be doing them no favor. For those who lack an existing station from which to weather the transition, we would be giving them nothing but a license to lose money.

For those potential entrants who genuinely are interested in becoming AM broadcasters, I would suggest exploring the possibility of acquiring an existing station. My understanding is that it is a buyer's market.

September 26, 1991

CONCURRING STATEMENT OF
COMMISSIONER ANDREW C. BARRETT

In re: Review of the Technical Assignment Criteria for the AM Broadcast Service

I wholeheartedly agree with the goals of improving AM radio. As a youth, I listened to AM radio. I understand its pioneering role in making radio broadcasting a vital part of our culture. The technical changes adopted in our Report and Order should go a long way towards restoring the economic health of many AM stations. I have not questioned the need to do something to relieve the congestion on the existing band. I have questioned the need to do so at the total expense of new entrants.

I can only concur with the decision to allocate 100 percent of the expanded band to existing AM broadcasters. The public interest standard and the First Amendment have both championed the cause of diversity. Diversity of media ownership has long been a goal of the Congress and this Commission. Today's decision calls into question the commitment of the Commission to further those goals. In the decisions of this Commission, I have attempted to ensure that opportunities were not denied to new entrants. New entrants represent the small businesses I believe are a valued part of the economic fabric of this nation. Just this year, the Commission evidenced its concern for small businesses by indicating that we would pursue forming an Advisory Committee on Small Business initiatives. I remain committed to that goal. I recognize that many AM operations are small businesses. Our decision makes no distinctions, however, between the stand alone AM daytime-only operator and the owner of numerous stations. These small broadcasters and new entrants may be kept out in favor of existing broadcasters with a large group of stations. Indeed, the Commission's order seeks to raise the national and local ownership limits to ensure that these licensees are not restricted in their ownership of expanded band stations. Pursuant to the Commission's Order, an existing licensee with almost all the broadcast facilities in a market could be granted an expanded band station over the stand alone licensee or the new entrant. The harm to diversity is compounded for the new entrant since he will not even be allowed to get the old facility.

New entrants may be exactly what is needed on the expanded AM band. Often, new entrants bring with them new ideas and new ways of conducting business. These "radical" ideas sometimes are the savior of industries. Although I would not want to regulate the formats or the programming on expanded band stations, I do recognize that having a new format or different programming may

assist in bringing listeners back to AM radio. The listeners will support the radio stations that are innovative and offer something different from what they may be getting now. I do not intend to disparage the programming of existing broadcasters. I merely suggest that some new entrants may get listeners onto the expanded AM band. In the movie industry, for example, it has often been the new entrant who has brought new ideas that challenged the establishment. The new ideas brought viewers back to the theater. Indeed, it has been the new entrants in almost every American business that has revitalized established industries. This is merely one reason why I think it important that we not foreclose the door to opportunity for new entry onto the expanded band.

In addition, new entrants on the expanded band could encourage listeners to trade in their old receivers for new receivers capable of receiving expanded band signals. By restricting access of the expanded band to existing licensees and permitting them to simulcast for five years, the Commission has not provided any incentives for the public to upgrade their receivers. A new entrant would provide the public with something that they may only be able to attain by purchasing a new radio. Without new programming or programming different than that on the existing band, a consumer would likely wait until the last minute to upgrade. This scenario would lead to delay in the full potential of the expanded AM band.

The rationale for excluding new entrants is that the overall goal of interference reduction will somehow be undermined if existing broadcasters are not granted 100 percent of the spectrum. This rationale is faulty for many reasons. First, there is no demonstration that the goal of substantial interference reduction could not be attained with less than 100 percent of the spectrum. Second, it is not clear that those who will cause the greatest amount of interference reduction will even apply for these expanded band stations. Third, if the Commission's goal is to eliminate interference on the existing band, the Commission's order should not allow the existing AM stations to continue operations for five years. True interference reduction would occur by having a shorter transition period. Fourth, the Order removes the freeze on filings for new AM facilities. Lifting the AM freeze at this time is inconsistent with a goal of interference reduction. Finally, the Commission has not taken significant steps to identify or take regulatory action with respect to stations that have discontinued operations on the existing AM band. Such stations may already offer opportunities for interference reduction.

I also am concerned that we do not take this action without full consideration of the possible impact on the digital audio broadcasting (DAB) allocation scheme. DAB has the potential to revolutionize radio broadcasting. It may assist in curing many

of the problems with AM radio. I would hope that the Commission can soon move forward on consideration of this service. In so moving, I believe it imperative that we consider a means to offer opportunities for new entrants. I am pleased that my colleagues have indicated in this Order that our decision in no way foreshadows the treatment of the DAB allocation. Nor, will this determination be of any precedential value for other future spectrum allocation determinations, such as DAB, high definition television (HDTV) or personal communications networks (PCN). This decision is one in which we recognize the serious economic problems faced by AM radio due to the Commission's technical rules; and attempts to alleviate some of these problems. We are taking several remedial actions to cure the technical problems of AM service. The decision on the expanded AM band is a result of this scheme and should not be viewed as a generalized policy favoring incumbent licensees. In light of this distinction, I will concur with the Commission's decision.

Concurring Statement
of
Commissioner Ervin S. Duggan

In Re: Review of the Technical Assignment Criteria for the AM Broadcast Service (MM Docket No. 87-267).

I generally support this item and its overarching goal of reducing interference and improving the quality of AM radio. As I said last year when we adopted our initial proposals in the Notice of Proposed Rulemaking, these efforts may require some pain and sacrifice on behalf of some AM broadcasters for the common good of the industry and all radio listeners -- and that entails pain and discomfort for the Commissioners and staff who have worked so hard on this issue.

I am concurring, however, with respect to the new policies we are adopting for migration to the AM expanded band. As strongly as I support the goal of reducing interference, I also believe that the goal of improving the AM band must be balanced against other worthy public policy concerns, especially encouraging competition and a diversity of voices in the radio industry.

I therefore have advocated reserving a small amount of spectrum in the expanded band, even 10% or one channel, for new entrants. The public interest benefits of such an "open-door" reserve, in my judgment, would underscore our interest in new voices and increased diversity --- and would emphasize that the FCC does not have an "incumbents only" policy as new spectrum becomes available. I know that some have argued that such a reservation would undercut our interference reduction goals. I counter that the benefits would far outweigh the costs, especially since interference is tackled in this item on a broadly gauged, incremental basis. Trade-offs of the sort that I have proposed are a difficult but necessary part of regulation in the public interest.

I have not advocated set-asides for particular special interests in this item, although I agree with the general goal of enhancing minority and female ownership in the communications industries. My main concern here is that our expanded band policies should not set a precedent for limiting applications to existing AM licensees, or appear to dilute our traditional comparative licensing criteria. Leaving a window of opportunity for new licensees would not necessarily deprive existing radio station owners of the benefits of reduced interference promised by this proceeding. Moreover, if digital audio broadcasting can only be implemented through an in-band system for the AM band, we

may be foreclosing future as well as current opportunities for new entrants into this industry. I recognize that we may need to reserve the remaining television spectrum for existing broadcasters in order to implement high definition television, but that situation seems distinguishable from the incremental efforts we can take to reduce AM interference.

Finally, I am pleased that the Commission has decided to soften its original proposal on the question of prohibiting AM/FM simulcasting. Based on the comments we received in this proceeding, it appears uncertain whether the reduced interference and diversity benefits of eliminating simulcasting outweigh the likely harm to the radio industry, especially at a time when we are trying to strengthen AM broadcasters in this proceeding and in our radio ownership rulemaking proceeding.

*U.S. Government Printing Office: 1991 — 312-024/60004